IN THE

Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND AMERICAN SMELTING AND REFINING COMPANY,

Appellee

CONSOLIDATED CAUSES

BRIEF FOR APPELLEES IN UNITED STATES v. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING AND REFINING COMPANY

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Counsel for Appellees.

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1. It is *res adjudicata* on the record before this Court on this appeal that the line-haul rates of the appellee carriers include compensation for all the terminal services here involved.

2. Even if this issue were not *res adjudicata* on this record, the Commission itself in its report and findings, 270 I. C. C. 359 (R. 364-375), on which are based its order which the Statutory Court has permanently enjoined, *has expressly repudiated* a finding previously made by it in these proceedings, that such line-haul rates *do not include compensation* for the terminal switching services here involved, *and has expressly undertaken to make its enjoined order without any finding whatever in this respect.*

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IN THE

Supreme Court of the United States

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellants,* v. UNITED STATES SMELTING, REFINING & MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY, *Appellees,* and UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellants,* v. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND AMERICAN SMELTING AND REFINING COMPANY, *Appellee.*	No. 173 CONSOLIDATED CAUSES

BRIEF FOR APPELLEES IN UNITED STATES v. DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING AND REFINING COMPANY*

I.

PRELIMINARY STATEMENT

Before proceeding to a general Statement of the Case, appellees desire to call to the attention of the Court two

*While these so-called "consolidated causes" are embraced in this single appeal from the single injunctive order of January 10, 1949 of the Statutory 3-Judge Court in the District Court of the United States for the District of Utah, such injunctive order is itself directed to two separate orders of the Interstate Commerce

(Continued p. 2)

facts shown on this record which, aside from all other grounds of invalidity of the Commission's enjoined order, are decisive against this appeal from the permanent injunction granted by the Statutory Court against that order. Both were ignored without the slightest mention by the appellants in their jurisdictional statement. Both are still ignored in the brief of the United States. Only the most cursory reference is made to either in the brief of the Interstate Commerce Commission.

Commission, brought before that Court by two separate complaints. Since the two complaints, however, involved substantially similar legal questions, they were heard and decided by the Statutory Court in a single proceeding, though separate records were made on each complaint.

This brief is directed specifically to the appeal from the injunctive order of that Court so far as that order enjoins the Commission's order of May 18, 1948, 270 I. C. C. 359 (R. 362), relating to terminal switching services of the appellee carriers at the smelters of the American Smelting and Refining Company located at Garfield and Murray, Utah, and Leadville, Colorado. The proceeding before the Statutory Court, in this respect was known as Civil Action No. 1525. (Since the operation of the Murray smelter has been permanently abandoned subsequent to the taking of this appeal, this brief will not discuss either the order of the Statutory Court or of the Commission so far as either relates to the Murray smelter.)

This brief will not be specifically directed to the appeal from the injunctive order of the Statutory Court so far as that order enjoins the Commission's separate order of May 18, 1948, 270 I. C. C. 385 (R. 321) relating to the terminal switching services of the same appellee carriers at the single smelter of the United States Smelting, Refining and Mining Company located at Midvale, Utah. The proceeding before the Statutory Court in that respect was known as Civil Action No. 1524. Because, however, both the American Smelting case and the United States Smelting case involve essentially the same legal questions, it is believed that the legal principles discussed in this brief will necessarily be applicable to the order appealed from as a whole.

These facts are the following:

1. As the Statutory Court has expressly found (R. 459) it is *res adjudicata* on the record before this Court on this appeal that the line-haul rates of the appellee carriers *include compensation* for all the terminal services here involved.

2. Even if this issue were not *res adjudicata* on this record, the Commission itself in its report and findings, 270 I. C. C. 359 (R. 364-375), on which are based its order which the Statutory Court has permanently enjoined, *has expressly repudiated* a finding previously made by it in these proceedings, that such line haul rates *do not include compensation* for the terminal switching services here involved, *and has expressly undertaken to make its enjoined order without any finding whatever in this respect.*

These two facts it will be shown make wholly irrelevant on this appeal: first, any question of the sufficiency of the evidence before the Commission to prove that the line-haul rates do include compensation for such terminal switching services, or as to the competency of the witnesses who so testified; second, any question of the actual extent of such terminal switching services, or whether they do or do not exceed uninterrupted "simple switching or team track delivery"; third, any question whether the "plant yard" at Garfield, and the "flat yard" at Leadville, do or do not constitute convenient points for delivery and receipt of carload freight by the appellee industry, to and from the appellee carriers.

This for the following reasons:

(1) The Commission's enjoined order is avowedly, it will be shown, the result of the application by the Commission to the terminal switching services, performed by the appellee carriers at the appellee industry, of a general formula set forth in the Commission's Basic Report in these proceedings. *Ex Parte 104, Part II*, 209 I. C. C. 11. Such formula in substance limits the terminal switching services which a carrier may perform on industrial tracks under line-haul rates of the character specified in such Basic Report, and without charge in addition to such line-haul rates, to such services as are the equivalent of "simple switching or team-track delivery", which can be performed at the carrier's ordinary operating convenience without interruption of movement by the industry.

(2) Under Point IV of this brief it will be shown that such Basic Report recognizes that the *legal application* of such formula *is necessarily limited* to line-haul rates which *do not include compensation* for terminal switching services on industrial tracks in excess of such "uninterrupted simple switching or team-track delivery", and that such formula *can have no legal application* to line-haul rates which *do include compensation* for additional terminal switching services.

(3) Under Point V of this brief it will be shown that in every decision of this Court in which it has sustained an order of the Commission made, as here, under Section 6(7) of the Interstate Commerce Act,* based on the application by the Commission of such general formula to the

*Section 6(7) of the Interstate Commerce Act is set out in Appendix A to this brief.

terminal switching services of other carriers at other industries, the record before this Court *has contained a finding by the Commission* that the line-haul rates *did not include compensation* for the particular terminal switching services there in question, and that this Court has expressly so recognized.*

(4) Under Point VI of this brief, it will be shown that although there may be a violation of Section 6(7) of the Act by the performance of terminal switching services without compensation in addition to the line-haul rates, even where the tariffs specifically provide that the performance of such terminal switching services is included under the line-haul rates, there can be such violation only if the line-haul rates *do not include compensation* for such terminal switching services, and there can be no violation if the line-haul rates *already include such compensation.*

Assuming that this brief establishes the validity of the foregoing legal propositions, appellees respectfully submit that the two cited facts of record, *ipso facto*, render invalid the Commission's findings that the appellee carriers violate Section 6(7) of the Act by performing the terminal switching services here in question without compensation in addi-

*The prior decisions of this Court here referred to are the following:

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402;

Goodman Lumber Company v. *United States*, 301 U. S. 669;

A. O. Smith Corporation v. *United States*, 301 U. S. 669;

United States v. *Pan American Petroleum Corporation*, 304 U. S. 150;

United States v. *Wabash R. Co.* (Staley case), 321 U. S. 403;

Corn Products Refining Company v. *United States*, 331 U. S. 790.

tion to the line-haul rates, and *ipso facto*, invalidate the Commission's enjoined order which would require the appellee carriers to make charges in addition to the line haul rates for such switching services, since thereby the enjoined order, as the Statutory Court has also expressly found (R. 460; Conclusion of Law No. 3) would require the appellee carriers to charge, and the appellee industry to pay, twice for the same services.

These facts of record, and the legal propositions applicable to them, have, however, an additional and important significance. They demonstrate that there is nothing in the order of the Statutory Court, or in the contentions of the appellees in support of it, which in any way challenges the validity of the Basic Report of the Commission, of the general formula there set forth, of any orders heretofore made by the Commission under that general formula, or of any decision of this Court which has sustained such prior orders of the Commission. On the contrary, it will be shown, that it is the appellants who, by this appeal and their contentions in support of it, seek to evade the Commission's own recognition in its Basic Report of the legal limitations on the application of such general formula, and seek to evade the fact that this Court, in its prior decisions, has sustained the application of such formula only when so limited.

Accordingly, this brief, before undertaking to establish the validity of the foregoing legal propositions, will undertake in its Statement of the Case under Point II, to show the manner in which the two facts, decisive against this appeal, appear on the record before this Court.

II.

STATEMENT OF THE CASE SHOWING THE MANNER IN WHICH IT APPEARS ON THIS RECORD:

A. THAT IT IS *RES ADJUDICATA* THAT THE LINE-HAUL RATES OF THE APPELLEE CARRIERS *INCLUDE COMPENSATION* FOR ALL TERMINAL SWITCHING SERVICES OF THE APPELLEE CARRIERS HERE IN QUESTION.

B. THAT THE COMMISSION HAS EXPRESSLY REPUDIATED ITS FORMER FINDING TO THE CONTRARY, AND HAS EXPRESSLY UNDERTAKEN TO MAKE ITS ENJOINED ORDER WITHOUT ANY FINDING WHATEVER IN THIS RESPECT.

This is an appeal by the Interstate Commerce Commission and the United States from an order of January 10, 1949 of a 3-Judge Statutory Court of the District Court of the United States for the District of Utah, permanently enjoining the order of the Commission of May 18, 1948 (R. 363).

The Commission's order required that the appellee carriers cease and desist from performing, in the delivery and receipt of carload freight at the smelters of the appellee industry, American Smelting and Refining Company at Garfield, Utah and Leadville, Colorado,* terminal switching

*The Commission's order also applied to such terminal switching services of the appellee carriers at the smelter of the appellee industry, American Smelting & Refining Company, at Murray, Utah. Since the Commission's order was made and permanently enjoined by the Statutory Court, the appellee industry has permanently abandoned the operation of its smelter at Murray. The order of the Commission has, therefore, to this extent become moot, and in this respect will not further be considered in this brief.

services beyond certain designated points at each smelter, without making compensatory switching charges *in addition* to the *line haul rates* for the terminal switching services beyond such designated points. The Commission's order was based on findings made by the Commission in a report, issued contemporaneously with its order, that the performance by the appellee carriers of such terminal switching services beyond points designated as the "plant yard" at Garfield and the "flat yard" at Leadville, without compensatory charges in addition to their line haul rates, violate Section 6(7) of the Interstate Commerce Act; *American Smelting and Refining Company, Terminal Services, Ex Parte 104, Part II*, 270 I. C. C. 359 (R. 364-375), already referred to under Point I of this brief.*

*While the Commission's findings and order apply to such terminal switching services in the receipt and delivery of *all* carload freight at the Garfield and Leadville smelters of the appellee industry, the terminal switching services which, in reality, are the actual occasion of the Commission's order, are those performed by the appellee carriers in the delivery at such smelters of inbound carloads of non-ferrous ores and concentrates. Such commodities move under rates based on *terminal* weights and graded according to the actual value of the metal content per ton of each carload. The industry is required by the tariffs of the appellee carriers to certify to the delivering carrier such actual values in order that such carrier may determine and assess the lawfully applicable freight charges (See Exhibit 4, R. 1145, 1146). The tariffs of the appellee carriers have, however, for over 40 years provided that such graded line-haul rates on non-ferrous ores and concentrates include the specified terminal switching services at each smelter, necessary to determine the actual value of each carload and to place such cars thereafter for unloading (See Appendix B, pp. b7-b10), except that, as will later be shown in more detail, the tariffs at Garfield have, since 1937, required the payment of certain switching charges in addition to the line-haul rates for so-called "interrupted movements" (See Appendix B to this brief).

The Commission's enjoined order was made in certain supplemental proceedings under a general investigation instituted by the Commission on its own motion by its order of July 6, 1931 (R. 124). On May 14, 1935, the Commission issued its so-called Basic Report in such proceedings, already referred to: *Ex Parte 104, Part II*, 209 I. C. C. 11.*

In such Basic Report, as already stated under Point I, and as will be shown in detail under Point IV of this brief, the Commission laid down as a general formula, that the terminal switching services which a carrier may lawfully perform under its line-haul rates without charge in addition to such line haul rates, are limited to the equivalent of "simple switching or team track delivery", which can be performed at the carrier's ordinary operating convenience without interruptions of movement by the industry.

As has already been stated under Point I, it will also be shown under Point IV that such Basic Report recognizes that the *legal application* of such formula *is necessarily limited* to line haul rates which *do not include compensation* for terminal switching services in excess of such uninterrupted "simple switching or team track delivery", and that such formula *can have no legal application* to line haul rates which *do include compensation* for additional terminal switching services.

What it is desired here to point out is that preceding such Basic Report, and as stated therein, the Commission had held hearings relating to the terminal switching services performed by rail carriers in the receipt and delivery of

*This Basic Report, while not incorporated in the record, is by stipulation to be considered part of the record (R. 503).

carload freight at some 200 industries throughout the country. Among these hearings, was one of May 19, 1932, relating to the terminal switching services of the appellee carriers at the Garfield Smelter of the appellee industry. Also among such hearings were hearings relating to the terminal switching services at the industries involved in the decisions of this Court cited in the footnote, *ante* p. 4, in which this Court has sustained prior orders of the Commission relating to the terminal services of the carriers at such industries.*

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*The following facts are significant in this connection:

All of the orders of the Commission which this Court has sustained in prior decisions, with the exception of the order of the Commission involved in the *Corn Products* case, *supra*, were made within a few months after the issuance on May 14, 1935 of the Commission's Basic Report, *and on the basis of evidence taken at hearings prior to such Report.* The Commission, however, made no order on the basis of the evidence taken at the hearing on May 19, 1932, relating to the terminal switching services at the Garfield smelter of the appellee industry, *until more than ten years later* it issued its report and order of October 1, 1945, 263 I. C. C. 719 (R. 55-86). This order, moreover, was made only after the taking of further evidence at a hearing in 1944, involving terminal switching services both at the Garfield smelter and the Leadville smelter of the appellee industry.

These facts are significant in connection with the following statement in the Basic Report (p. 44) just preceding the statement in that report of the general formula, on the basis of which formula the Commission shortly thereafter made the orders subsequently sustained by this Court in its cited decisions. That statement reads as follows:

> "It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, *but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or as-*

At the hearing of May 19, 1932, held before an Examiner of the Commission, it appears, as is shown by the transcript of such hearing (R. 535-565), that while the Commission itself and the appellee carriers were represented by counsel, the appellee industry was not represented and did not participate in such hearing.

At the hearing Mr. Williams, Freight Traffic Manager of the appellee Denver and Rio Grande Western Railroad Company, hereinafter referred to as the D. & R. G., testified as a witness not only for his company but for the appellee Union Pacific Railway Company, hereinafter referred to as the Union Pacific. On behalf of both carriers, he testified in substance that the terminal switching services rendered by them, particularly in the switching movements necessary to determine the value of inbound shipments of non-ferrous ores and concentrates at the Garfield smelter and to place such shipments for unloading, *were included*

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sistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne." (Italics supplied.)

Appendix C to this brief will show by quotation from the uncontradicted testimony of Mr. Williams and Mr. Carel[illegible] for the appellee D. & R. G., and of Mr. Tuckwood for the appellee American Smelting and Refining Company, that starting with the inception of the service of the appellee carriers at the smelters of the appellee industry in the early nineteen hundreds, the line-haul rates of the appellee carriers have always included compensation for the terminal switching services here in question; that the appellee carriers have always performed such services under their line-haul rates; that the tariffs have always provided for the performance of such services under the line-haul rates; and that the appellee industry had never itself performed any such switching services either at its own expense or under allowance from the carriers.

in the line-haul rates. In addition, Mr. Williams testified that the published tariffs specifically so provided. Since even an abstract of Mr. Williams' testimony is, of necessity, extensive, such abstract has been postponed to Appendix II of this brief. It will suffice to say here that counsel for the Commission did not challenge Mr. Williams' testimony either by its cross-examination of Mr. Williams or any evidence in rebuttal. *On the contrary, by far the major part of Mr. Williams' testimony in this respect was developed by questions from the Commission's counsel or its Examiner.*

The Commission failed to make any order as a result of such hearing, and neither the appellee carriers or the appellee industry heard anything further of the matter until the Commission by its order of March 16, 1944 (R. 156), in which no reference was made to the 1932 hearing, assigned a hearing relating to the terminal switching services of the appellee carriers at the Garfield and Leadville smelters of the appellee industry.

Such hearing was held May 26th and May 27th, 1944. The transcript of such hearing appears of record (R. 873-1132) and with certain agreed omissions the exhibits filed at such hearing appear of record (R. 1132-1396).

At such hearing Mr. Carey, who had succeeded Mr. Williams as Freight Traffic Manager of the appellee D. & R. G., again appeared as the witness both for that carrier and for the Union Pacific (R. 908-918; 1095-1102). He expressly corroborated the testimony given by Mr. Williams as to the inclusion of the terminal switching services within the line-haul rates. In addition, Mr. Carey filed exhibits showing the tariff provisions under which, since 1908, the terminal switching services in question had always been

published as included in the line-haul rates. He specifically called attention to the fact that prior to 1920 the tariffs, in providing for the inclusion of such switching services in the line-haul rates, had provided that they should be performed "free" under the line-haul rates. Mr. Carey expressly testified (R. 916) that the tariffs in using the term "free" did not mean such services were performed without compensation under the line-haul rates, *but that the line-haul rates included compensation* for such terminal switching services. Mr. Carey also elaborated upon the reasons for the inclusion in the line-haul rates of the terminal switching services in question.*

Both Mr. Williams' prior testimony and Mr. Carey's testimony were corroborated in substance (R. 944-958; 1047-1051) by the testimony and exhibits of Mr. Tuckwood, the then General Traffic Manager and now Vice-President of the appellee American Smelting and Refining Company.*

In Mr. Tuckwood's testimony he, in addition, called attention to a case decided in 1918 by one of the members of the Statutory Court from whose order this appeal is taken, the Honorable Tillman D. Johnson, as corroborating Mr. Carey's foregoing construction of the word "free" as used in the tariffs of the appellee carriers prior to 1920. This decision was in a test case brought by the Oregon Short Line Railway, now part of the appellee the Union Pacific, entitled *Oregon Short Line Railway* v. *American Smelting & Refining Company*. The decision is unreported, but a copy of it was introduced by Mr. Tuckwood as his Exhibit 14 (R. 1315-1318).

*Abstracts of the testimony of Mr. Carey and Mr. Tuckwood likewise appear in Appendix B of this brief.

As there appears, the carrier was seeking to recover from the appellee industry $60,378.71 for the terminal switching of inbound shipments of non-ferrous ores and concentrates at its Murray smelter on the ground that the word "free", which appeared in connection with such switching in the tariffs of both appellee carriers until their amendment in 1920 (R. 1243; see also R. 498), made the tariff provisions for the inclusion of such switching within the line-haul rates illegal. As appears from Judge Johnson's decision (R. 1316), the case was tried upon an agreed statement of facts.

In his decision, Judge Johnson after commenting (R. 1317) on the position of the industry that the word "free" used in the tariff did not mean a gratuitous service, but only meant that such switching services would be performed without any charge in addition to the line-haul rate, and that the value of such service was included in the line-haul rate, said, among other things, (R. 1318):

> "*Perhaps in a prosecution by the United States,* or in a complaint made by a shipper, *facts would be developed which would show that this service rendered by the plaintiff and its assignors was in fact a rebate* allowed the defendant by the plaintiff and its assignors, and that it was and is an unjust, unfair and unreasonable discrimination against other shippers, *but as the record now stands there is, as I view it, not only a failure* of proof with respect to these matters, *but the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate.*
>
> "The judgment will be that the action be dismissed." (Italics supplied)

udge Johnson's decision, it may be noted, was affirmed by he Circuit Court of Appeals for the Eighth Circuit, 269 J. S. 898.

Judge Johnson's decision is important not only as furishing corroboration for Mr. Carey's testimony, but is ven more important as a commentary on the record before his Court.

To paraphrase Judge Johnson's decision,

> "Perhaps in this investigation by the Commission, facts could have been developed which would show that the terminal switching services in question were in fact a rebate, because the reasonable value of them was not included in the transportation rate."

The point here is that it is undeniable that neither at he Commission's 1932 hearing or its 1944 hearing did the Commission, though represented not only by its Examiner, ut by its counsel, make any attempt to develop such facts, ither by cross examination or by rebuttal evidence of the estimony of Mr. Williams, Mr. Carey or Mr. Tuckwood. Moreover, as will shortly be shown, the Commission made o attempt to develop any such facts, even when prior to the ssuance by the Statutory Court of its permanent injunction ere appealed from, that Court had issued a temporary njunction and remanded the proceeding to the Commission, with an express suggestion that the Commission might lo this very thing (R. 300). Furthermore, it may be bserved that neither at the 1932 hearing, nor at the 1944 earing, did counsel for the Commission raise any question f the qualification of the witnesses to give such testimony.

In short, on the record before the Statutory Court, and now before this Court, the testimony of such witnesses is not only uncontradicted, but as the Statutory Court twice found, it is the sole testimony of record in this respect (R. 300, 455).

In January 1945 the Examiner who had presided at the 1944 hearing, and another Examiner of the Commission, issued their proposed report (R. 86-116). As there appears, the Examiners recommended (R. 99, 116) that the Commission should find in substance that the line-haul rates of the appellee carriers *did not include compensation* for terminal switching services beyond the "plant yard" at Garfield and the "flat yard" at Leadville, and that the performance of terminal switching services beyond such designated points, without charges in addition to the line-haul rates, violated Section 6(7) of the Act. The Examiners also recommended that an appropriate order be entered. *In such proposed report, the Examiners made no mention whatever of the foregoing uncontradicted testimony of Mr. Williams, Mr. Carey and Mr. Tuckwood.*

On March 27, 1945, the appellee industry filed exceptions with the Commission to such proposed report (R. 156-210). As will there appear, such exceptions pointed out to the Commission that the Examiners' proposed report had wholly ignored such testimony and its relevance to the validity of their recommended order under Section 6(7).

After argument upon such exceptions before Division 3 of the Commission, consisting of three members, that Division, on October 1, 1945, issued the original report of the Commission in these supplemental proceedings, 263 I. C. C. 719 (R. 55-86), Commissioner Miller dissenting. On the

basis of such proposed report, Division 3 made an order substantially similar to the order here enjoined (R. 85).

The report of Division 3 was substantially a repetition of the Examiners' proposed report, and made the findings recommended in the proposed report as to the terminal switching services at the Garfield and Leadville smelters (R. 67, 84). Moreover, like the proposed report, it *wholly ignored, without the slightest mention,* the uncontradicted testimony of Mr. Williams, Mr. Carey and Mr. Tuckwood. Moreover, Commissioner Miller's dissent (R. 84, 85) was specifically on the ground *that there was no contradiction* in the record of the testimony of these witnesses *that the line-haul rates "were made sufficiently high to compensate * * * for such services."*

Thereupon, the appellee industry filed with the Commission a petition for reconsideration by, and reargument before the entire Commission of the report and order of Division 3 (R. 212-246). This petition again pointed out the total ignoring, both in the Examiners' proposed report and in the report of Division 3, of the uncontradicted testimony of the foregoing witnesses and its relevance to the validity of the order of Division 3, of October 1, 1945. This petition was denied by the Commission's order of March 22, 1946 (R. 247).

Thereupon, on April 25, 1946, the appellee industry filed a second petition for reconsideration and reargument before the entire Commission based on substantially the same grounds (R. 248-255). While the printed record does not so show, the appellee carriers supported both petitions of the appellee industry. On June 3, 1946, the Commission made an order granting this second petition (R. 255), and

thereupon, reargument was had before the full Commission.

As a result of such reargument, the Commission issued its report and order of October 14, 1946, 266 I. C. C. 349 (R. 29-51), Commissioners Alldredge* and Mahaffie dissenting, and Chairman Barnard and Commissioner Aitchison not participating. Appellants concede (Jurisdictional Statement, footnote, p. 4), that the Commission's order of October 14, 1946 (R. 28) was substantially similar to the Commission's order of May 18, 1948 (R. 363, 364), here enjoined.

In the majority report, even the majority at long last finally took notice of the testimony of Mr. Williams and Mr. Carey, though not of Mr. Tuckwood. In so doing, the majority report stated, p. 358 (R. 40):

> *"One of the principal and important facts in issue in this proceeding is whether the line-haul rates include compensation for the switching services.* That is a question which is susceptible of proof by factual evidence. It is the function of witnesses to furnish such evidence and the province of the Commission to make the conclusion of fact." (Italics supplied.)

It is illuminating to observe the manner in which the majority thereupon undertook *not* to carry out this admirable statement of the proper functions of the Commission in this respect.

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*The dissenting opinion of Commissioner Alldredge appears R. 51-52, and his dissenting opinion, there referred to, in *Anaconda Copper Mining Co. Terminal Allowance*, 266 I. C. C. 387, 394-396, appears R. 52-54.

On the same page of its report, the majority undertook wholly to reject the testimony of Mr. Williams and Mr. Carey on the ground that they were not qualified to give such testimony, stating in this connection:

> "No showing was made that the witnesses had anything to do with the making of the rates, or were even in the carrier's service when the rates were first established. They are not shown to have had any information relative thereto, except such as is shown in the tariffs, and inferences they draw from the past practices of the carriers."

It has already been noted that although the Commission was represented by counsel at the 1932 hearing, when Mr. Williams testified, and at the 1944 hearing when Mr. Carey corroborated and elaborated Mr. Williams' testimony, counsel for the Commission raised no question of the qualification of either witness. Indeed, the record shows (R. 916) that when counsel for the appellee industry attempted at the 1944 hearing, preliminary to directing Mr. Carey's attention to Mr. Williams' testimony at the 1932 hearing, to elicit from Mr. Carey what experience his predecessor, Mr. Williams, had had in connection with the rates of the D. & R. G., the Commission's Examiner, on his own initiative, refused to permit Mr. Carey to answer. Furthermore, as already noted, and as the abstract of Mr. Williams' testimony contained in Appendix B to this brief will show, *it is here again to be emphasized, that most of Mr. Williams' testimony in this respect was in fact elicited by questions to him* from the Commission's *counsel or its Examiner*. It could not in any event, as the majority must well have known, be anything but the sheerest impudence to question

that the freight traffic manager of a carrier would have knowledge of the measure and structure of its freight rates since he then was *ex officio* responsible for such rates. It would further be equally impudent to assume that since he was *ex officio* responsible for the measure and structure of such rates at the time he testified, he nevertheless was wholly ignorant of their measure and structure in the past. However this may be, the question of the competence of Mr. Carey or Mr. Williams or the competence of their testimony is no longer open on this record, since, as already suggested and as shortly will be shown, that issue has become *res adjudicata*.

Nevertheless, it will be illuminating to this Court to refer briefly to another and equally important aspect of such majority report of October 14, 1946. This is the paradoxical use which the majority in that report attempt to make of the decision of Judge Johnson in 1918 in the case of *Oregon Short-Line Railroad Company* v. *American Smelting & Refining Company, supra*. It has been seen, *ante*, p. 13, that Mr. Tuckwood at the 1944 hearing had cited this decision of Judge Johnson and its affirmance by the Circuit Court of Appeals as corroborating Mr. Carey's testimony at that hearing that the use of the word "free" in the tariffs of the appellee carriers prior to 1930 in connection with the performance of the terminal switching services in question under the line-haul rates were without compensation, but that compensation for them was included in the line-haul rates. The majority report, instead of giving any weight to Judge Johnson's conclusion to the same effect in his cited decision, at the very outset of its reference to that decision, p. 358 (R. 40) treated the mere fact that the carrier had instituted the suit in question as conclusive proof of

> "the fact that the carriers recognized that the line-haul rates did not include compensation for the switching services."

What, however, is of the utmost importance on this record is the fact that the majority report went further. It treated the mere fact that the carrier had brought the suit in question as conclusive proof of the substantive fact that the line-haul rates of the appellee carriers do not include such compensation as the terminal switching services. This is shown by the fact that following the discussion of Judge Johnson's decision in the majority report, pp. 358-359 (R. 41) and even in the face of Judge Johnson's conclusion as there quoted that,

> "as the record now stands there is not only a failure of proof with respect to these matters, *but a fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rates.*"* (Italics supplied)

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*It is notable that while the majority report does quote this portion of Judge Johnson's conclusion, its purported paraphrases of Judge Johnson's decision immediately preceding the quoted portion of his conclusion omits any reference to those parts of such decision as are most significant with relation to the record, then before the Commission, and now before this Court. Judge Johnson's decision in this respect reads as follows (R. 1317):

> "To give or take a rebate is a crime. Unfair and unreasonable discrimination is unlawful and illegal. This tariff, and others of similar import, were filed with the Interstate Commerce Commission more than ten years ago. During all this period the provisions of the tariffs were acquiesced in, at least, by the Interstate Commerce Commission. The railroad companies had performed this service for the defendant and made no demand for payment therefor until this action was commenced. Unfair dealing, fraud, or criminality cannot be presumed and ought not

(continued on p. 22)

the majority report immediately makes the following finding, p. 359 (R. 42):

> "*It is clear that the line-haul rates* when first established did not include the expensive terminal switching performed at the smelter, and that they have not been increased since that time to include, and *do not now include, compensation* for such services." (Italics supplied)

This is the finding, which it will later be shown, the Statutory Court, both in connection with its temporary injunction of November 14, 1947 and its permanent injunction of January 10, 1949, here appealed from, found to be not only without any evidence to support it but contrary to the only evidence of record.

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to be inferred from words or acts reasonably capable of innocent interpretation.

"It is possible that in making this tariff providing the rate of transportation that the reasonable value of the contemplated switching service was included, and when it is considered that it was publicly filed with the Interstate Commerce Commission, approved, or at least acquiesced in by the Commission for many years, and when it is further considered that men in their business dealings generally do not violate the law of the land but act honestly, and, I might add, in their own interest, the possibility above noted becomes a high probabilty. Such, of course, may not be the fact. Perhaps in a prosecution by the United States or in a complaint made by a shipper, facts would be developed which would show that this service rendered by the plaintiff and its assignors was in fact a rebate allowed the defendant by the plaintiff and its assignors, and that it was and is an unjust, unfair and unreasonable discrimination against other shippers, *but as the record now stands there is, as I view it, not only a failure of proof with respect to these matters, but the fair and reasonable inference is that the tariff contemplated, and in fact included, the reasonable value of the switching charges in the transportation rate.*

"The judgment will be that the action be dismissed." (Italics supplied)

It is here desired to point out that this finding can have other basis, even on the face of the majority report, than e indefensible assumption of the majority that the mere inging of suit by the carrier in question before Judge Johnn, was not only proof that the appellee carriers recogzed that the line-haul rates did not include compensation r the terminal switching services in question, *but was nclusive proof of the substantive fact* that the line-haul tes *did not include such compensation.*

As has been seen, the uncontradicted testimony of Mr. illiams and Mr. Carey was that the line-haul rates *did clude compensation* for such terminal switching services. s has also been seen, Judge Johnson's finding, affirmed by e Court of Appeals, was to this same effect. Even assumg that the mere bringing of the suit before Judge Johnson as evidence to some degree that the appellee carriers did ot consider that the line-haul rates included compensation r the terminal switching services, and as such served, in me degree, to impeach the testimony of Mr. Williams d Mr. Carey to the contrary, *the mere bringing of such it still could not furnish affirmative proof of the substanve fact that the line-haul rates did not include such comnsation.**

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*It may be suggested that the majority report in making its ding that

> "It is clear that the line-haul rates * * * do not now include, compensation for such services."

based to some extent on the fact referred to, pp. 353, 354 of that port (R. 34) that in July, 1938 the tariffs at Garfield were anged to provide a charge in addition to the line-haul rate for -called "interrupted" terminal switching services, on the theory at this change is evidence that the line-haul rates did not include mpensation for such terminal switching services. It is notable, wever, that the majority report on its face makes no reference

(Continued p. 24)

However this may be, it will now be shown that any such issue has become *res judicata*.

On June 13, 1947 the appellee carriers and the appellee industry filed their complaint in the District Court of the United States for the District of Utah (R. 1-28) asking that a three-Judge Statutory Court be convened and that, after hearing, the Commission's order be set aside and annulled, and its enforcement forever enjoined. Such Statutory Court having been convened and a hearing having been had before it, such Court, by its order of November 14, 1947, (R. 302) temporarily enjoined the Commission's order of October 14, 1946 and in so doing made, among others, the following Findings of Fact (R. 299, 300):

"FINDINGS OF FACT

"1. The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the companies within the respective plants.

"2. We find that upon such basis the order is contrary to law in that there is no evidence before

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to such tariff change as being in any way the basis for its finding in this respect. This is for a very good reason. As shown in that report, p. 366 (R. 49) no such change was, or has been made in the tariffs at Leadville. The majority obviously recognized the danger of suggesting that such tariff change at Garfield, which, at most, affected so-called "interrupted" terminal switching services, was evidence that the line-haul rates did not include compensation for *such* terminal switching services, since, by a parity of reasoning, the fact that the carriers had made no similar tariff change at Leadville would thereby become evidence that the line-haul rates included compensation for *all* terminal switching services at that point.

In this connection see also Mr. Carey's testimony (R. 912) that the tariff change at Garfield was published under the misapprehension that the Commission's Basic Report required it.

the Commission which would justify the finding that such rates were not compensatory to the transportation companies for the service so rendered.

"3. *That the sole evidence* in the record which would justify a finding upon that point *is to the contrary.** (Italics supplied)

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*In view of the subsequent conduct of the Commission, it is particularly to be noted that one member of the Statutory Court, the Honorable Orie Phillips, in concurring in the Findings of Fact and Conclusions of Law of the majority, expressed the opinion that certain additional findings, which he specified, should be made (R. 300-303). Among these findings were, in substance, the following:

a). That the "plant yard" at Garfield, and the "flat yard" at Leadville, have the physical characteristics of terminal facilities of the appellee carriers.

b). That the only evidence of record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the points where the Commission found the line-haul compensation begins and terminates, especially uninterrupted movements beyond such points.

c). That there is no evidence in the record to support a contrary factual conclusion.

d). That there is no evidence in the record to overcome the presumption that the railroads are not performing such services gratuitously, citing *Interstate Commerce Commission* v. *C. B. & Q. Ry. Co.*, 186 U. S. 320.

e). That the order of the Commission does not merely require a segregation between line-haul transportation and terminal switching services. On the contrary, it requires the railroads to file additional tariffs exacting separate and reasonable and compensatory charges for switching services. This would result in two charges for the same services.

f). That the question of whether the Commission might require the publication of new tariffs segregating line-haul transportation charges from terminal switching charges, is not presented and the Court should not express any opinion with respect thereto.

"4. That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

"5. We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

The Statutory Court also made the following Conclusions of Law (R. 300):

"CONCLUSIONS OF LAW

"(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, and that the cases should be returned to the Commission *for further proceedings upon the basis of evidence to be taken, or otherwise, upon a new theory* of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in Securities & Exchange Commission vs. Chenery Corporation, ... U. S. ..., June 23, 1947 and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this Court." (Italics supplied)

The Commission took no appeal from this temporary injunction order of the Statutory Court (R. 302). Instead, the Commission by its order of December 5, 1947 (R. 377) vacated its temporarily enjoined order of October 14, 1946 and reopened the proceedings before it,

> "* * * for reconsideration of the report and order entered October 14, 1946 *upon the present and existing record*". (Italics supplied)

Thereupon, without any further hearings, briefs, or argument, or the taking of any additional evidence (R. 454), the Commission made its order of May 18, 1948, which, as will later appear, is the order here permanently enjoined (R. 363).

Moreover, in its contemporaneous report upon which such order was based, 270 I. C. C. 359 (R. 364-375), the Commission *expressly repudiated its prior findings* that the line-haul rates of the appellee carriers *did not include compensation* for the terminal switching services in question, *and expressly disclaimed any finding whatever in this respect.* In this respect the Commission's report reads as follows, p. 362 (R. 368):

> "It is our purpose to make it entirely clear that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court of our original and supplemental reports in Ex Parte No. 104, Part II *and that said order is not based in whole or in part upon any conclusions or findings* in connection with the tariff provisions or testimony *as to whether the published rates are* reasonable *and do or do not include compensation for switching within the plant areas. We*

> *hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."** (Italics supplied)

Thereupon, on October 11, 1948, the appellee carriers and the appellee industry filed a complaint in the same District Court (R. 342-362) asking that a 3-Judge Statutory Court be again convened and that, after hearing, the Commission's order of May 18, 1948 be set aside and annulled, and its enforcement forever enjoined.

Thereupon, after hearing before a Statutory Court consisting of the same three Judges who had constituted the prior Statutory Court, such Court granted the permanent injunction here appealed from (R. 463, 464).

In granting such permanent injunction, such Statutory Court made certain Findings of Fact, among which were its Findings (6) and (7) (R. 453, 454). These Findings were in substance: that neither the Commission nor the United States had taken any appeal from the Statutory Court's prior order of November 14, 1947 temporarily enjoining the Commission's order of October 14, 1946; that, instead, the Commission had reopened the proceedings before it for reconsideration of such temporarily enjoined order "upon the present and existing record"; that thereafter on May 18, 1948, it made its order on the same record on which

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*It is characteristic of the conduct of the majority throughout the proceedings before the Commission that here they do not hesitate to stultify their own statement from their prior report of October 14, 1946, p. 358 (R. 40), already quoted herein that

> *"One of the principal and important facts in issue* in this proceeding *is whether the line-haul rates include compensation* for the smelting services." (Italics supplied)

it had made its temporarily enjoined order of October 14, 1946 and without any further hearing, evidence, briefs, or arguments.

By its Finding (11) (R. 455) the Statutory Court reaffirmed its Findings of Fact numbers 1 to 5, inclusive, previously made in connection with its order of temporary injunction of November 14, 1947, and herein quoted *ante* pp. 24-26. It then made certain additional Findings of Fact, among which was its Finding of Fact number (15) (R. 456), reading as follows:

> "(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. (i.e., The "plant yard" at Garfield and the "flat yard" at Leadville.) On the contrary, *the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation* for all terminal switching services beyond such designated points, *including any so-called 'interrupted movements' incident to determining the value of inbound shipments of non-ferrous ores and concentrates.*" (Parenthetical matter and italics supplied)

After making other Findings of Fact, to which reference will later be made, the Statutory Court then entered as its first Conclusion of Law the following (R. 459):

> "CONCLUSION OF LAW
>
> "1. It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers *include compensation* for *all* terminal switching services

here involved at the respective smelters of plaintiff industries." (Italics supplied)

It has already been noted that neither the United States nor the Interstate Commerce Commission even mentioned this Conclusion of Law in their joint jurisdictional statement, and that the United States in its brief on this appeal has likewise totally ignored it. It will now be seen that, while the Commission's brief on this appeal does mention this Conclusion of Law, it both misrepresents the basis of it and attempts to evade it, by a disingenuous misconstruction of the grounds of the order of remand of the Statutory Court in connection with the prior temporary injunction granted by that Court against the Commission's order of October 14, 1946.

III.

THE COMMISSION, IN ITS EFFORTS BOTH TO IMPEACH THE STATUTORY COURT'S CONCLUSION OF *RES ADJUDICATA*, AND TO JUSTIFY THE MAKING OF ITS ENJOINED ORDER OF MAY 18, 1948 WITHOUT FURTHER HEARING OR EVIDENCE, HAS THE NAIVETE OR EFFRONTERY TO ATTEMPT TO SUPPORT SUCH EFFORTS BY INVOKING THE GROUNDS ON WHICH THE STATUTORY COURT MADE ITS ORDER OF REMAND IN CONNECTION WITH ITS PRIOR TEMPORARY INJUNCTION, *ALTHOUGH THE COMMISSION IN ITS ORDER HERE ENJOINED, AND IN THE PROCEDURE ON WHICH THAT ORDER IS BASED, HAS TOTALLY DISREGARDED THE GROUNDS STATED BY THE STATUTORY COURT FOR SUCH REMAND.*

Before referring to the Commission's attempt to impeach the Statutory Court's finding of *res adjudicata* as to the inclusion in the line-haul rates of compensation for all terminal services here involved, by misinterpreting the

grounds upon which the Statutory Court made its order of remand in connection with its prior temporary injunction, it is believed that it will be illuminating to note the Commission's persistent misrepresentation of the grounds upon which the Statutory Court reached such conclusion of *res adjudicata*, and the Commission's evasion of any consideration of that conclusion whatever until next to the last full page of its brief.

The Commission's brief is 127½ pages in length. Not until page 126 does that brief give any consideration whatever to the first Conclusion of Law of the Statutory Court, in granting the injunction here appealed from, that

> "(1) It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers *include compensation* for *all* terminal switching services here involved at the respective smelters of the plaintiff industry." (italics supplied)

It is true that at page 32 of the Commission's brief this Conclusion of Law is cited as among the "Specification of Errors to be Urged." It is also true that as there cited, the basis of such Conclusion of Law is wholly misrepresented. The Commission's brief states as No. 5 of its "Specification of Errors to be Urged", the following:

> "5. In deciding, court conclusion 1, that the question as to line-haul rates including compensation for all terminal services involved, is res adjudicata, because, under finding 6, no appeal was taken from the prior court order remanding prior Commission orders for further consideration."

Of course, the Statutory Court did not base such Conclusion of Law merely upon the failure of the Commission to appeal from the prior temporary injunction granted by

that Court's order of November 14, 1947 against the Commission's order of October 14, 1946.* Indeed, the Commission's own brief, when at page 126 it, for the first time, gives any consideration to such Conclusion of Law, so shows. There again, however, the Commission's brief persists in misrepresenting the basis of such Conclusion of Law by the Statutory Court. That brief says, page 126:

> "Astonishingly, findings (6) and (7) in the last action (R. 453-454), is to the effect that no appeal was taken from the prior decisions, that the orders of October 14, 1946 were vacated, that reconsideration was based upon the existing record, and that no further hearings was held, no further evidence received, and no further briefs permitted. *Upon these findings* (1) held *res adjudicata* the question as to compensation for service being included in the line-haul rates (R. 459)." (Italics supplied)

Not only is it significant that the Commission's brief should twice misrepresent such Conclusion of Law of the Statutory Court, but the basis of this second misrepresentation is still more significant. This second misrepresentation omits any reference to the fact that such Conclusion of Law, in addition to being based on Findings of Fact (6) and (7) of the Statutory Court (R. 453, 454), is based on Findings of Fact (8) and (9) (R. 454, 455). Finding of Fact (8) has to do with the fact that the Commission, in

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*Appellees would not have contended, nor would they assume, that a Statutory Court, of the competence of that here involved, would have upheld a contention that *the mere failure* of the Commission *to take an appeal from such order* of temporary injunction and of remand, would have barred the Commission from taking further evidence to support either its temporarily enjoined order of October 14, 1946, or its new order of May 18, 1948.

its report of May 18, 1948, *supra*, page 362 (R. 368), on which is based its order here permanently enjoined, *expressly repudiated* its prior finding in its report of October 14, 1946, *supra*, page 359 (R. 42), that,

> "*It is clear* that the line-haul rates * * * *do not now include compensation* for such services." (Italics supplied.)

and expressly disclaimed at the same page of its report *any finding whatever in this respect*, in connection with its order of May 18, 1948, here permanently enjoined.

Finding of Fact (9) is based on the Commission's *express disclaimer* in its report of May 18, 1948, page 367 (R. 373, 374), *of any finding whatever* as to whether or not the switching charges in addition to the line-haul rates for so-called interrupted switching movements, published since 1938 in the tariffs at Garfield, *are or are not reasonable and compensatory.**

The Commission's brief, having thus thoroughly misrepresented the basis of the conclusion of *res adjudicata* by the Statutory Court, thereupon seeks, at one and the same time, to impeach that conclusion and, in addition, to justify the making of its enjoined order of May 18, 1948, without further hearing or evidence. It does this by invoking, pages 125-127 of that brief, the grounds given by the Statutory Court for its order of remand of November 14, 1947, in connection with its prior temporary injunction of the Commission's order of October 14, 1946.

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*Finding of Fact (9) also inadvertently refers to such additional switching charges at Leadville. As already noted, the record shows that no such additional switching charges have ever been published at Leadville, and the Commission's report of October 14, 1946, *supra*, p. 366 (R. 49), expressly so recognizes.

It is with regret that counsel for appellees feel compelled to say that the precise bases upon which the Commission's brief invokes the grounds given by the Statutory Court for its order of remand, are largely unintelligible. It is possible, however, to discern a few of them.

The Commission's brief states, starting at the bottom of page 125 and continuing on page 126:

> "Actually the Commission, in entering the report, believed that it was precisely what was desired and expected by the lower court. This belief was based upon the findings, particularly (4) and (5) (R. 300), and the order (R. 302), which stated that the cases were remanded to the Commission 'for such action as it may find justifiable in the premises.'"

Findings (4) and (5) of the Statutory Court in connection with its prior temporary injunction, read as follows (R. 300):

> "(4) That in view of the decision of the Commission in *Ex Parte* No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.
>
> "(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under *Ex Parte* 104 in that the order made is not specifically based upon that authority."

The best answer to the Commission's naive belief that its report of May 18, 1948 and its order here enjoined of the

same date, were "precisely what was desired and expected by the lower court," is the comment of Judge Phillips at the conclusion of the hearing before the Statutory Court (R. 475) where Judge Phillips stated:

> "The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad(s) merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line-haul and a separate specific charge for switching services beyond the end of the line haul, and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do."

What Judge Phillips here had reference to was the extraordinary suggestion made by counsel for the Commission in the earlier hearing before the Statutory Court in connection with the Commission's former order of October 14, 1946, that such order of the Commission could have been complied with by merely segregating in the tariffs the line-haul and terminal switching services, *without any increase in the aggregate rates.* Judge Phillips thereupon remarked that if this was all the Commission's order meant, the Commission should have made it plain, but that this was not the meaning of the Commission's order as drawn, which plainly required charges in addition to the line-haul rates.*

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*The colloquy in this respect between Judge Phillips and Mr. Crenshaw, counsel for the Commission, appears in the reporter's transcript of hearing before the Statutory Court of June 18 and 19, 1947. While this transcript is contained in the record before this Court, because of its length, only a small portion of such transcript is printed of record. The portion here referred to is not printed but appears at pages 252 to 255 of that transcript. Also, see particularly pp. 259-261.

Counsel for appellee, moreover, in replying to this extraordinary suggestion of counsel for the Commission, pointed out, as had Judge Phillips, that both counsel for the Commission and counsel for the United States had charged the appellee carriers with rebating to the appellee industry, and asked how they could square any such charge with the position taken by counsel for the Commission that the Commission's order could be complied with merely by splitting the publication of the existing aggregate charges as between line-haul services and terminal switching services, and without any increase in the aggregate charge. Counsel then pointed out that under Section 6 (7), on which the Commission expressly based its order of October 14, 1946, the Commission had no authority merely to require the segregation of switching charges from line-haul charges, but that any such authority the Commission had was under Section 6 (1).*

On the subsequent hearing before the Statutory Court, of October 18, 1948, which resulted in the order of that Court of January 10, 1949, here appealed from, permanently enjoining the Commission's order of May 18, 1948, Mr. Dumbauld, speaking both for the United States and the Commission, renewed in connection with that order the contention that it, like the Commission's prior order of October 14, 1946, could be complied with merely by segregating in the tariffs the line-haul charges and the terminal switching charges *without any increase in the aggregate rates*. A lengthy colloquy again ensued between Mr. Dumbauld and Judge Phillips, in the course of which Judge Phillips remarked:

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*See reporter's transcript of the hearing before the Statutory Court of June 18 and 19, 1947, pp. 269-270.

> "We thought when we sent this case back that you would do one of two things; that you would either make an investigation and find the line-haul tariff (non) compensatory—you have got to—or put in a tariff for the line-haul and for the switching and you didn't do either."*

The Commission's brief in any event fails to offer any reason why it did not avail itself of the opportunity afforded it by the Statutory Court, in its order of remand, to make an order under Section 6 (1) by merely requiring segregation in the tariffs of the line-haul charges and the terminal switching charges of the appellee carriers without any increase in the aggregate charges, instead of expressly basing its enjoined order of May 18, 1948, on Section 6 (7), and expressly requiring by that order in connection with the findings upon which it was made, that the appellee carriers publish terminal switching charges *in addition to the line haul rates* for all terminal switching beyond the "plant yard" at Garfield and the "flat yard" at Leadville (R. 363; 374-375). It is notable, moreover, that the Commission's brief does not suggest that its enjoined order of May 18, 1948, can be construed as merely to require segregation in the tariffs of line-haul charges and terminal switching charges, without any increase in the aggregate rates.

The Commission's brief, however, pp. 126-127, does purport to offer an explanation for the failure of the Commission to hold any further hearing for the purpose of taking further evidence under the specific opportunity afforded by the Statutory Court in its remand of the pro-

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*See reporter's transcript of the hearing before the Statutory Court of October 18, 1948, pp. 95-98. Such transcript is of record before this Court, but is not printed in full because of its length.

ceedings to the Commission in connection with its temporary injunction of November 14, 1947 against the Commission's order of October 14, 1946.*

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*Such opportunity was offered the Commission in the Conclusions of Law of the Statutory Court just preceding its formal order of remand (R. 300). The Statutory Court there said:

"CONCLUSIONS OF LAW

"(1) We conclude as a matter of law that in the state of the present record there is no legal basis for the order issued by the Commission, and that the cases should be returned to the Commission *for further proceedings upon the basis of evidence to be taken, or otherwise, upon a new theory* of its inherent power to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in Securities & Exchange Commission vs. Chenery Corporation, . . . U. S. . . ., June 23, 1947 and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this Court." (Italics supplied)

Conceivably, this somewhat inartistic language of the Statutory Court might be construed to mean that the Commission, if it elected to proceed "upon a new theory of its inherent power", i.e., Section 6(1), to require the carriers to segregate in their tariffs their line-haul and terminal switching charges, might do so without further evidence. Such construction, however, would depend on the grammatical seperation in the mandate of the words "evidence to be taken" from the words "upon a new theory", by the disjunctive phrase, "or otherwise". Such a construction, moreover, would have been an imprudent one on the part of the Commission, since the Commission must have known that whatever the Statutory Court said, the Commission could not legally proceed under Section 6(1), without invoking that Section and affording a hearing thereunder. In any event, whatever may be the proper construction of the mandate in this respect is a purely academic question, since, as will be seen, the Commission did not elect to proceed under Section 6(1), but elected in its enjoined order of May 18, 1948, still to proceed under Section 6(7).

Whether or not, as discussed in the footnote, the remand of the Statutory Court would have required a hearing under such remand, had the Commission based its new order under such remand on Section 6(1), by merely requiring the segregation of line-haul and switching charges without increase in the aggregate rates, the Court's remand clearly required a hearing should the Commission base its new order on Section 6(7) and require switching charges *in addition to the line-haul rates*, as the Commission expressly did in its enjoined order of May 18, 1948. This is beyond question, because the Statutory Court, in temporarily enjoining the Commission's prior order of October 14, 1946, which, like its order of May 18, 1948, was expressly based on Section 6(7), had expressly held that such prior order was without evidence to support it, since not only was there no evidence in the record to support the Commission's finding in connection with such prior order that the line-haul rates *did not include compensation* for the terminal services in question, but the sole evidence was to the contrary.

The attempted explanation, therefore, made in the Commission's brief, pp. 126-127, for its failure to hold any further hearing or take any further evidence before making its enjoined order of May 18, 1948, is almost incredibly naive. That brief, p. 127, quotes the Commission's attempted explanation in this respect in its report of May 18, 1948, *supra*, p. 366 (R. 373), where the Commission said:

> "A further hearing would serve no purpose as the record contains a full and complete statement and description of all material facts appertaining to and the reasons for all services actually performed by respondents at each plant. This was impliedly con-

> ceded by all parties as no request for a further hearing to introduce additional evidence was made."

There must be some limits to naivete, but apparently neither the Commission's report nor the Commission's brief recognizes any.

As has already been seen, the Commission, following the Statutory Court's temporary injunction and remand of November 14, 1947, without taking any appeal, proceeded, by its order of December 5, 1947 (R. 377) to vacate its order of October 14, 1946, and to reopen the proceedings before it

> " * ** for reconsideration of the report and order entered October 14, 1946 *upon the present and existing record.*" (Italics supplied)

Under such an order, there was no reason why appellees should ask further hearing, and every reason why they shouldn't.

Unless the appellees were both mind-readers and soothsayers, they could not possibly know what the Commission intended to do upon such reconsideration "upon the present and existing record". In their wildest imagination, however, they never would have assumed that the Commission would again undertake to make an order under Section 6(7), without at least attempting, by further hearing, to offer evidence to rebut, what the Statutory Court had found to be "the sole evidence upon such *present and existing record*", that is, that the line-haul rates *do include compensation* for the terminal switching services in question, or to offer *affirmative* evidence that the line-haul rates ***do not include*** such compensation.

Furthermore, there was certainly no reason, even had appellees known that the Commission intended to make its new order under Section 6(7), why the appellees should have asked further hearing since "the present and existing record" was entirely satisfactory to them, particularly in view of the construction by the Statutory Court upon that record.

Indeed, appellees had no idea whatever what the Commission might do under such an extraordinary order. Had it occurred to the appellees that the Commission might, without further hearing and "upon the present and existing record" attempt to make an order under Section 6(1), there was still no reason why appellees should ask further hearing, since appellees knew, if the Commission did not, that the Commission could not make an order under Section 6(1) without expressly invoking that Section, and without a hearing under that Section. This would seem particularly clear in view of the Commission's repeated holdings in these proceedings that they are proceedings exclusively under Section 6(7). (See Report October 1, 1945, *supra*, p. 729 (R. 67); also Report October 14, 1946, *supra*, p. 358 (R. 40)). It seemed still more clear since this Court had affirmed the Commission's position in this respect in other cases, particularly in the *Staley Case*, *supra*, page 410.

Lastly, had the appellees, following the Commission's order of reopening of December 5, 1947, applied to the Commission for further hearing, the only reasonable assumption is that such further hearing would have been denied. This assumption would certainly be warranted by the Commission's *express disclaimer* in its report of May 18, 1948, *supra*, page 362 (R. 368), in connection with its order of the same date, *of the necessity of any finding what-*

ever as to whether the line-haul rates *do or do not include compensation* for the terminal switching services in question although that order was expressly based, as shown on page 368 of the Commission's report (R. 375) on a finding of violation of Section 6(7). It could hardly be supposed, therefore, that the Commission would have granted further hearing, even had appellees asked it, to supply further evidence on an issue which the majority of the Commission considered wholly irrelevant. Furthermore, there was no reason why the appellees should ask for it, since the record already contained uncontradicted evidence that the line-haul rates *did include compensation* for the terminal switching services in question.

IV.

THE COMMISSION IN ITS BASIC REPORT IN THESE PROCEEDINGS, *EX PARTE 104, PART II*, 209 I. C. C. 11, IN LAYING DOWN A GENERAL FORMULA FOR DETERMINING WHAT TERMINAL SWITCHING SERVICES ON INDUSTRIAL TRACKS ARE INCLUDED IN A CARRIER'S LINE-HAUL RATES, HAS ITSELF EXPRESSLY RECOGNIZED IN SUCH BASIC REPORT THAT THE LEGAL APPLICATION OF SUCH GENERAL FORMULA IS NECESSARILY LIMITED TO THE LINE-HAUL RATES WHICH *DO NOT INCLUDE COMPENSATION* FOR TERMINAL SWITCHING SERVICES IN EXCESS OF UNINTERRUPTED "SIMPLE SWITCHING OR TEAM-TRACK DELIVERY", AND THAT SUCH FORMULA CAN HAVE NO LEGAL APPLICATION TO LINE-HAUL RATES WHICH *DO INCLUDE COMPENSATION* FOR ADDITIONAL TERMINAL SWITCHING SERVICES.

The general formula which the Commission has laid down in its Basic Report in *Ex Parte 104, Part II, supra*, for determining what terminal switching service on indus-

trial tracks are included in a carrier's line-haul rates and may not be exceeded without violation of Section 6(7) of the Act without charges in addition to such line-haul rates, is nowhere concisely stated in any one place in that report. However, there is no disagreement as between the appellants and appellees as to what that formula in reality is, nor is there, as will be seen, any misapprehension upon the part of this Court in that respect.

Such formula imposes two conditions on the performance under a carrier's line-haul rates of the character there contemplated, of terminal switching services on industrial tracks:

First; that such terminal switching services shall not be in excess of "the equivalent of team-track or simple switch placement."

Second; that such terminal switching services shall be such as may be performed by the carrier "at its ordinary operating convenience * * * without interruption or interference by the desires of an industry or the disabilities of its plant."

The first part of such general formula appears in the Basic Report, p. 36, where in referring to certain rules adopted by the Central Freight Association, the Trunk Line Association and the New England Freight Association as set forth in Appendix A to the Basic Report, the Basic Report states:

> "The first part of paragraph (3) 2 (c) of appendix A reads as follows:
>
> 'The Interstate Commerce Commission has held that switching services by a plant facility

> for account of a carrier must not exceed the equivalent of team track or simple switch placement. If no unusual or marked difficulty of operation in a plant is presented, the service may be considered not in excess of a simple switch.'
>
> This part of the paragraph is included in the formula used in western trunk-line territory, but the formula of the latter also contains the following sentence: 'Any service in addition to that shall be at the expense of the industry.' *This rule coincides with our conception of a carrier's duty with respect to the delivery and receipt of freight.*" (Italics supplied)

The second part of the formula, which indeed includes the first, appears in the Basic Report, pp. 44-45, as follows:

> "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act."

For convenience, appellees have paraphrased this general formula at page 9 of this brief as providing that a

carrier may perform under its line-haul rates only such terminal switching services in the receipt and delivery of carload freight on industrial tracks *"as shall not be in excess of the equivalent of 'simple switching or team-track delivery', which can be performed at the carrier's ordinary operating convenience without interruption of movement by the industry."*

Appellees believe that this paraphrase of such general formula in the Basic Report will not be questioned by appellants. It is to be noted that elsewhere in this brief appellees for the sake of greater brevity have referred to the formula as limiting the terminal switching services which are included in a carrier's line-haul rates to such as shall not be in excess of "uninterrupted simple switching or team-track delivery."

Moreover, purely for the purposes of this appeal, this brief will assume that the terminal switching services essentially at issue in these proceedings, *i.e.* those rendered by the appellee carriers in connection with the delivery of inbound carloads of non-ferrous ores and concentrates at the Garfield and Leadville smelters of the appellee industry, *do exceed* "uninterrupted simple switching or team-track delivery."

What appellees will undertake to show here is what the Statutory Court has in terms found by its finding of fact (18) (R. 457-459) in connection with its permanent injunction here appealed from: This is, that the Basic Report itself expressly recognizes that the *legal application* of such general formula *is necessarily limited* to line-haul rates which *do not include compensation* for terminal switching services in excess of "uninterrupted simple switching or team-track delivery", and that such formula can have *no*

legal application to line-haul rates which *do include compensation* for terminal switching services in excess of "uninterrupted simple switching or team-track delivery."

In this connection appellees call attention to the fact that on page 44 of the Basic Report immediately preceding the statement of that report's general formula on that page and page 45, already quoted, that report states:

> *"It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service*, but our consideration of the service *as here involved leads us to a different conclusion.* Many of the industries which now receive allowances, or the performance by the carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such cases the carriers simply assumed a burden not previously borne." (Italics supplied)

It should, therefore, be clear from this statement alone in the Basic Report that the "service as here involved", to which the Commission in its Basic Report contemplated its general formula was to be applied, was a terminal switching service which the Commission's consideration of the record showed the line-haul rates had not been fixed to compensate for. Moreover, as will be further discussed and as likewise shown in finding of fact (18) of the Statutory Court, this Court in *United States* v. *Wabash Railroad Company* has expressly so construed the Commission's finding in its Basic Report.

However, the Basic Report prior to the quotation above made from page 44, had already, at pages 29, removed any

doubt as to its own view of the law in this respect. Under the section of the Basic Report entitled, p. 20, "DISCUSSION OF THE APPLICABLE LAW", the Commission said, p. 29:

> "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, *and its legal obligation in such operations extends no further than is covered by the compensation* it exacts for the services performed. In other words, *the obligation upon the carrier in such circumstances is to be measured by the compensation received* and *not by any definite duty otherwise placed upon the carrier by the statutes.* The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co., supra.* Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the act. *American Exp. Co.* v. *United States, supra; Louisville & N. R. Co.* v. *United States, supra.*
>
> As previously stated, whatever transportation service or facility the carrier is required to supply it has a right to furnish. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra.*"

It is submitted that it would be impossible for the Commission to have made more clear its own recognition of the law or its own recognition that its general formula could have no legal application where "measured by the compensation received" the line-haul rates *include compensation* for terminal switching services in excess of "uninterrupted simple switching or team-track delivery."

Under the next point in this brief it will be shown that in every case in which this Court has sustained findings of the Commission that the carriers involved violated Section 6(7) of the Act by performing terminal switching services under their line-haul rates in excess of such "uninterrupted simple switching or team track delivery," without charges in addition to such line-haul rates, the record contains express findings by the Commission that the line-haul rates of such carriers *did not include compensation* for the terminal switching services which the Commission found to be in excess of "uninterrupted simple switching or team track delivery"; furthermore, that in every opinion which this Court has rendered in such cases, this Court in affirming the application of the Commission's general formula, has expressly recognized this fact.

It is, however, desired to point out here that because the records in the cases in which this Court has sustained prior orders of the Commission, based on the application under Section 6(7) of its general formula, did include express findings by the Commission in these respects, the attention of this Court, apparently, has never previously been called to the foregoing portions of the Basic Report in which the Commission itself recognized the legal limitations to the application of its general formula.

It will later be shown under Point VI of this brief that irrespective either of the recognition by the Commission, or of this Court, of the legal limitations on the application of the Commission's formula, it is self-evident that such general formula can afford no basis for a finding of a violation of Section 6(7), unless the line-haul rates *do not include compensation* for terminal switching services ren-

dered in excess of "uninterrupted simple switching or team track delivery".

What it is desired here particularly to emphasize, and what appellees trust this Court will clearly understand, is that neither this brief of the appellees nor the findings of the Statutory Court, in any way challenge the findings or conclusions of the Commission's Basic Report or the general formula there set forth. On the contrary, it is the appellees who accept *in full* the findings and conclusions of the Commission's Basic Report, and it is the appellants who seek to evade those findings and conclusions of that report, by suppressing all reference to those portions of that Report expressly recognizing the legal limitations inherent in, and intended by the Basic Report itself.

Furthermore, it can not be too clearly understood that since this brief assumes, for the purposes of this appeal, that the terminal switching services here principally involved, *i.e.*, those rendered by the appellee carriers upon inbound carloads of non-ferrous ores and concentrates at the smelters of the appellee industry, do exceed "uninterrupted simple switching or team track delivery", no question, therefore, is presented on this record which can involve an examination of the record underlying the Commission's Basic Report, to determine either what the Commission meant in that Basic Report by "uninterrupted simple switching or team track delivery", or whether the terminal switching services here in question are, or are not, in excess of those to which the Commission contemplated the application of its general formula.

V.

IN EVERY CASE IN WHICH THIS COURT HAS SUSTAINED PRIOR ORDERS OF THE COMMISSION, BASED ON THE APPLICATIONS OF THE GENERAL FORMULA IN ITS BASIC REPORT TO THE TERMINAL SWITCHING SERVICES OF OTHER CARRIERS AT OTHER INDUSTRIES, THE RECORD BEFORE THIS COURT HAS EXPRESSLY SHOWN THAT SUCH GENERAL FORMULA WAS APPLIED BY THE COMMISSION TO LINE-HAUL RATES WHICH *DID NOT INCLUDE COMPENSATION* FOR THE TERMINAL SWITCHING SERVICES THERE INVOLVED, AND THIS COURT HAS EXPRESSLY SO RECOGNIZED.

IN EVERY SUCH CASE, MOREOVER, THE COMMISSION IN FINDING THAT THE CARRIERS VIOLATED SECTION 6(7) OF THE ACT, BY RENDERING THE TERMINAL SWITCHING SERVICES IN QUESTION WITHOUT CHARGES IN ADDITION TO THE LINE-HAUL RATES, BASED SUCH FINDING UPON AN EXPRESS FINDING THAT THE LINE-HAUL RATES *DID NOT INCLUDE COMPENSATION* FOR TERMINAL SWITCHING SERVICES IN EXCESS OF "UNINTERRUPTED SIMPLE SWITCHING OR TEAM-TRACK DELIVERY".

It has already been noted in this brief, *ante* p. 5, that this Court in certain decisions there cited, has sustained all prior orders of the Commission which have come before this Court in prior supplemental proceedings under *Ex Parte 104, Part II* in which the Commission, upon the basis of the application of the general formula in its Basic Report to the terminal switching services rendered by other carriers of other industries, has found that such carriers violated Section 6(7) of the Act, either by rendering such terminal switching services under their line-haul rates without compensation in addition thereto, or by making allowances to

such industries for themselves performing such terminal services. For convenience of reference, however, such decisions of this Court are again cited in the subjoined footnote.*

This brief will show:

(a) That every such prior order of the Commission sustained by this Court was based on an express finding by the Commission that the line-haul rates *did not include compensation* for the terminal switching services there involved.

(b) That in every such case the Statutory Court in reviewing the Commission's order either found that there was evidence before the Commission to support the Commission's finding that the line-haul rates *did not include compensation* for the terminal switching services involved and sustained the Commission's order, or if the Statutory Court held there was no evidence to sustain such finding by the Commission and enjoined the Commission's order, the Commission and the United States appealed to this Court, and this Court thereupon sustained the Commission's order as based upon evidence justifying the Commission's finding.

(c) That in no case where a Statutory Court found that there was no evidence to sustain the Commission's finding that the line-haul rates *did not include compensation* for the terminal switching services in question,

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United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Company* v. *United States*, 301 U. S. 669; *A. O. Smith Corporation* v. *United States*, 301 U. S. 669; *United States* v. *Pan-American Petroleum Corporation*, 304 U. S. 150; *United States* v. *Wabash R. Co.* (Staley case), 321 U. S. 403; *Corn Products Refining Company* v. *United States*, 331 U. S. 790.

did the Interstate Commerce Commission not only fail, as here, to appeal from the order of the Statutory Court based on such finding, but, as here, itself expressly repudiated such finding, and thereby, as here, render such finding of the Statutory Court *res adjudicata*.

(d) That in every case, except the *Corn Products* case, *supra*, what was involved were allowances paid by the carriers to the industries for the performance by the industries of terminal switching services, which the record showed had prior to such allowances been performed by the industries at their own expense, and there was not involved, as here, merely the performance by the carriers of terminal switching services which they had always performed under the compensation in their line-haul rates, and which the industry had never performed at all. Thus, the records in such other cases, unlike this case, afforded evidence to support the Commission's findings that the line-haul rates in such other cases *did not include compensation* for the terminal switching services for which allowances were paid.*

*These circumstances, it is to be noted, bring all the Commission's orders upon which this Court has previously passed, except in the *Corn Products* case, *supra*, precisely within the statement made by the Commission in its Basic Report (p. 44), already quoted, showing that the Commission contemplated the application of its general formula, there laid down, to line-haul rates which *do not include compensation* for terminal switching services in excess of those specified by such formula. The Commission's statement in this respect is here re-quoted:

> "It is likewise urged that the line-haul rates be fixed to compensate the carrier for the performance of spotting service but our consideration of the service as here involved leads us to a different conclusion. Many of the industries

(Continued p. 53)

(e) That in all such allowance cases, moreover, the record shows that the industries, prior to such allowances, had always received cars from and delivered cars to the carriers at the points found by the Commission to be established "interchange tracks", and that the industries had never received cars from, or delivered cars to the carriers at points of unloading or loading on the industrial tracks beyond such "interchange tracks", but the industries had always performed all services between such "interchange tracks" and such points of unloading or loading at their own expense.

The record in this case, on the contrary, shows by uncontradicted testimony that the appellee industry has never delivered or received cars to and from appellee carriers, either at the "plant yard" at Garfield, or the "flat yard" at Leadville, that such points have never in fact been "interchange tracks" as between the appellee industry and the appellee carriers, and that all terminal switching services beyond such points have always been performed by the appellee carriers under the compensation in their line-haul rates, and have never been performed by the appellee industry. (See Finding of Fact 13 (R. 455, 456).)

Appellants, both in their joint jurisdictional statement nd in their separate briefs, suppress all reference to these

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which now receive allowances, for the performance by the carriers of the spotting services in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered, in such cases the carriers simply assumed a burden not previously borne."

highly relevant facts in connection with the prior decisions of this Court, which appellants presume to cite in support of their appeal. Indeed, appellants, both in their jurisdictional papers and in their briefs, have succeeded in misrepresenting both the nature of the Commission's orders upon which this Court passed in those decisions, and the grounds upon which this Court sustained such orders.

The appellants' tactics in these respects have been such that the only practical way to meet them, is not to attempt to follow them through their distortions of law and of fact in respect to such decisions, but to set out detailed proof in this brief of the facts here asserted as to those decisions.

Appellees regret the burden thus imposed upon this Court but the tactics of the appellants would seem to have made that burden unavoidable. In order, however, to lessen that burden as much as possible, appellees will confine the discussion in the body of this brief to the prior decisions of this Court itself, and will discuss the Commission's orders and findings relating thereto as well as the related orders of the respective Statutory Courts in Appendix C to this brief.

UNITED STATES v. AMERICAN SHEET & TIN PLATE CO., 301 U. S. 402.

In this decision this Court reversed the injunctions granted by a Statutory Court in the District Court of the United States for the Western District of Pennsylvania against the Commission's orders in six separate supplemental proceedings under *Ex Parte 104; Part II*,* and heard

*Footnote 3, page 405, of this Court's opinion tabulates the six supplemental proceedings there under review as follows:

and decided before the Court on a consolidated record. In so doing this Court said:

> "The appellees are five industrial concerns affected by the orders. They contend that the spotting service in question is transportation within the meaning of the Interstate Commerce Act; that the performance of the service, or the payment of an allowance to an industry which itself performs it, is sanctioned by custom and practice and by previous adjudications of the Commission; and that line-haul rates were fixed in contemplation of the rendition of such service. They further charge the orders are void because not supported by the Commission's findings or the evidence." (p. 404)
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> * * * * * * * * *
>
> "The Commission's report (209 I. C. C. 11) summarized its conclusions based on the evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers and numerous plants where such services were performed by the carrier. *The Commission found that line-haul rates had not been fixed to compensate the carriers for the performance of the servi-*

American Sheet & Tin Plate Co. Terminal Allowance, 209 I. C. C. 719;
Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273;
Pittsburgh Plate Glass Co. Terminal Allowance, 209 I. C. C. 467;
Weirton Steel Co. Terminal Allowance, 209 I. C. C. 445;
West Leechburg Steel Co. Terminal Allowance, 210 I. C. C. 213;
Pittsburgh Plate Glass Co. Terminal Allowance, 210 I. C. C. 527.

As already stated, these reports and orders of the Commission together with the decisions of the Statutory Court enjoining 15 F. Supp. 711 will be discussed in Appendix C to this brief.

ice in question and that the railroads, after fixing their rates, had assumed a burden not previously borne by them. * * *" (p. 404)

* * * * * * * *

"* * * Respecting § 6(7) they say that as, by that section and § 15(13) allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, *but the Commission has in each case, found* that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and *that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates.* * * *" (pp. 406, 407)

* * * * * * * *

"The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. *Since the Commission finds* that the carriers' service of transportation is complete upon delivery to the industries interchange tracks, *and that spotting within the plants is not included in the service for which the line-haul rates were fixed,* there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it." (p. 408)

It will be observed from the italicized portions of the above quotations from the opinion of this Court in the *American Sheet & Tin Plate* case, *supra:*

First: That at page 404 of that opinion, this Court expressly recognized that the line-haul rates as to which the Commission summarized its general conclusions in its Basic Report, 209 I. C. C. 11—i.e., referred to in this brief as its general formula—were line-haul rates which *"had not been fixed to compensate* the carriers for the performance of the service in question."

Second: That at pages 406 and 407 of that opinion this Court expressly states that in the case of each report and order there under review by this Court (see preceding footnote), the Commission has found that the industry *performed no service* beyond the "interchange tracks" *for which the carrier is compensated* under its interstate line-haul rates.

Third: At page 408 of such opinion this Court expressly recognizes that the Commission's power in the cases there under review to enjoin the performance of them, is based on the Commission's finding that "spotting within the plants *is not included in the service for which the line-haul rates were fixed.*"

GOODMAN LUMBER CO. v. UNITED STATES, 301 U. S. 669;

A. O. SMITH CORP. v. UNITED STATES, 301 U. S. 669.

This Court in deciding the above cases rendered no formal opinions. It merely affirmed in *per curiam* memoran-

dum opinions, on the authority of its prior decision in the *American Sheet & Tin Plate* case, *supra*, the judgments of the respective Statutory Courts. These judgments had, without reported opinions, sustained the Commission's orders, respectively, in *Goodman Lumber Co. Terminal Allowances*, 214 I. C. C. 89, and *A. O. Smith Corp. Terminal Allowances*, 215 I. C. C. 534.

In Appendix C it will be shown that the Commission in both such reports had expressly found that the line-haul rates *did not include compensation* for the spotting services beyond the "inter-change tracks", which the respective industries performed under allowances from the respondent carriers; further, that in both cases, prior to such allowances, the industries had always performed such spotting services beyond the "inter-change tracks" at their own expense.

UNITED STATES v. PAN-AMERICAN PETROLEUM CORPORATION, *ET AL.*, 304 U. S. 150.

In this decision this Court reversed an injunction granted by a Statutory Court in the United States District Court for the Southern District of Texas, 18 F. Supp. 624, against orders of the Interstate Commerce Commission in nine separate supplemental proceedings under *Ex Parte 104, Part II*.*

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*Footnote 3 to page 157 of this Court's opinion tabulates these nine supplemental proceedings there under review as follows:

Mexican Petroleum Corp. Terminal Allowance, 209 I. C. C. 394;

Celotex Co. Terminal Allowance, 209 I. C. C. 764;

Great Southern Lumber Co.—Bogalusa Paper Co. Terminal Allowance, 209 I. C. C. 793;

Standard Oil Co. Terminal Allowance, 209 I. C. C. 68;

Humble Oil & Ref. Co. Terminal Allowance, 209 I. C. C. 727;

(Continued p. 59)

In so doing, the opinion of this Court stated:

> "The Commission held that, in the circumstances disclosed at each of the plants under consideration, the carriers' obligation of delivery was fulfilled by placing or receiving cars on interchange tracks and that the moving and spotting of cars in the industries' plants *formed no part of the service covered by the line-haul rate.*" (p. 157)
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> * * * * * * *
>
> "The appellees charged that the Commission's findings and orders were not supported by substantial evidence. The District Court held with them upon this point. *We have examined the record and are of opinion that in each case there is substantial evidence to support the Commission's findings.*"

It will be shown in Appendix C that the Commission's findings and orders tabulated in the footnote show *in every case a finding* that the line-haul rates *did not include compensation* for the terminal services beyond the established "interchange tracks", for which the carriers made the allowances in question. Such reports show, moreover, *in every case* that, prior to the granting of such allowances, *the industries had performed all terminal services* beyond the established "interchange tracks" *at their own expense.*

UNITED STATES v. WABASH RAILROAD CO. (Staley case), 321 U. S. 403.

In this decision this Court reversed an injunction granted by the District Court of the United States for the

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Magnolia Petroleum Co. Terminal Allowance, 209 I. C. C. 93;
Texas Co. Terminal Allowance, 209 I. C. C. 767;
Gulf Ref. Co. Terminal Allowance, 209 I. C. C. 756;
Texas Co. Terminal Allowance, 213 I. C. C. 583.

Southern District of Illinois, 51 F. Supp. 141, against an order of the Interstate Commerce Commission in a supplemental proceeding under *Ex Parte 104, Part II*, in which the Commission had made two reports, *A. E. Staley Manufacturing Co. Terminal Allowance*, 215 I. C. C. 656, and 245 I. C. C. 383.

In so doing, the opinion of this Court stated:

> "In Ex parte 104, the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. *After a study of the conditions at some two hundred industrial plants* to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, *the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service* and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, *free*, or the payment to the industries of allowances for its performance by them, is in violation of § 6 (7) of the Act." (p. 406)
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> * * * * * * * *
>
> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, *and that its findings on that question will not be disturbed by the courts if supported by*

evidence. United States v. American Sheet & Tin Plate Co. supra (301 US 408, 81 L. ed. 1191, 57 S. Ct. 804); United States v. Pan American Petroleum Corp. supra (304 US 158, 82 L. ed. 1264, 58 S. Ct. 771); Interstate Commerce Commissions v. Hoboken Mfrs.' R. Co. 320 US 368, 378, ante. 107, 113, 64 S. Ct. 159, and cases cited." (p. 408)

* * * * * * * *

"Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in Ex parte 104, *are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks* and the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here." (pp. 409-10)

* * * * * * * *

"Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack. Their contention, upheld by the court below, is that the Commission's order cannot be supported merely by the circumstances disclosed by the evidence respecting the operations at the Staley plant, but that its validity must turn upon a comparison of the conditions at the Staley plant with those at competing plants. They urge further, and the District Court so held, that as it appears from the

record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley, contrary to §§ 2 and 3 (1).

"This argument ignores the nature of the present proceeding which is to enforce § 6(7), not §§ 2 and 3 (1). *Section 6 (7) prohibits departures from the filed tariffs and it is violated,* as the Commission has pointed out, *when carriers pay the industries* for a terminal service *not included in their transportation service* or when they render such terminal service *free of charge.*" (p. 410)

* * * * * * * *

"The Commission's decision here, and its finding of a 'preferential service,' are not based and do not depend on a comparison of conditions at the Staley plant with those obtaining at others. By its fifth finding the Commission found that the spotting service rendered at the Staley plant was a service 'in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks or industrial sidings and spurs.' and hence in excess of that provided for by the tariff rates. It concluded in its third conclusion of law that the performance of this service without charge would result in receipt by the Staley Company of 'a preferential service not accorded to shippers generally,' and hence would result in a prohibited refunding or remitting of a portion of the filed tariff rates.

"The Commission, after pointing out that evidence was introduced showing that spotting is performed without charge at various plants, some of which compete with the Staley Company, also found. 'The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially

similar to those at the Staley plant. If it did it would only show the probability of existence of unlawful practices at such plants and the need for investigation in connection therewith.' The District Court relied solely on this evidence to support its conclusion of lack of evidentiary support for the Commission's finding of a 'preferential service not accorded to shippers generally' and to support its own finding that under the present order Staley is being discriminated against. For this reason it concluded that the Commission's order must be set aside.

"We think that this is a mistaken interpretation of the Commission's findings and misapprehends their legal effect. If the Commission's reference, in its conclusion of law, to 'a preferential service not accorded to shippers generally' means more than the statement in the fifth finding of fact that the service is 'in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks,' it is obviously irrelevant to the present proceeding. For it could not serve to foreclose the legal conclusion to be drawn from the fifth finding *that the free performance of the spotting service* at the Staley plant is in violation of § 6 (7) because of the traffic conditions found to prevail there." (pp. 411-412).

* * * * * * * * *

"As the Commission and this Court have pointed out, a preference or rebate is the necessary result of every violation of § 6 (7) where the carrier renders or pays for a service not covered by the prescribed tariffs. Davis v. Cornwell, 264 U. S. 560, 562, 68 L. ed. 848, 850, 44 S. Ct. 410." (pp. 413-414)

It will be observed from the italicized portion here oted from page 406 of the opinion of this Court in the

Staley case, *supra*, that this Court again expressly recognizes, as it had recognized in the *American Sheet & Tin Plate* case, *supra*, that the general conclusions of the Commission's Basic Report in *Ex Parte 104, Part II*, 209 I. C. C. 11, were directed to terminal services performed at industries where the Commission had found

> "* * * that the freight rates *had not been so fixed as to compensate* the carriers for such service * * *." (italics supplied)

It will further be seen from the portion above quoted from page 408 of this Court's opinion in the *Staley* case that, while this Court expressly recognized

> "* * * that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not by the courts * * *,"

this Court implicitly recognized that the Commission's findings on such questions may be set aside by the Courts *if not supported by evidence*.

It is particularly to be noted from the two foregoing quotations from pages 409 and 410 of the opinion of this Court, that this Court there states that, aside from certain contentions of the Staley Company, based on a purely *formal* change of control of the interchange tracks by lease from that company to the Wabash Railroad, *executed subsequent to the Commission's report in Ex Parte 104*, which contentions this Court held irrelevant, that,

> "Appellees make no other serious contention of want of evidentiary support of the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court so found."

The remainder of the decision of this Court in the *Staley* case above quoted shows (p. 410) that the real contention of the Staley Company upheld by the District Court was

> "* * * that, as it appears from the record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley contrary to Sections 2 and 3 (1)."

This Court held, however, that this argument ignored the fact that the proceedings under *Ex Parte 104, Part II*, were to enforce Section 6 (7) and not Sections 2 and 3 (1).

In Appendix C it will be shown that both in the Commission's original report in the *Staley* case, and in its report on further hearing, the Commission expressly found that the line-haul rates *did not include compensation* for the terminal switching services beyond the "inter-change tracks" there involved, for the performance of which services by the Staley Company the respondent carriers paid that Company the allowances in question.

CORN PRODUCTS REFINING CO. v. UNITED STATES, 331 U. S. 790.

This Court rendered no formal opinion in the above case. By a *per curiam* memorandum it sustained, on the authority of the prior decisions of this Court in the *American Sheet & Tin Plate* case, *supra*, and the *Staley* case, *supra*, a motion by the appellees to affirm the judgment of the Statutory Court, 69 F. Supp. 869. That judgment had sustained the orders of the Interstate Commerce Commission in *Corn Products Refining Co. Terminal Services*, 262 I. C. C. 57 and 266 I. C. C. 181.

In Appendix C it will be shown that the Statutory Court in its Conclusion of Law No. 9, expressly recognized that the Commission had found that the spotting service which the there respondent carriers performed within the Corn Products plant, *was not included in the service for which the line-haul rates were fixed*, and that the Statutory Court held that there was substantial evidence to support such finding by the Commission.

It will also there be shown that on appeal to this Court, the Corn Products Company *assumed that the general formula* in the Commission's Basic Report *applied even if the line-haul rates included compensation* for terminal switching services in excess of "uninterrupted simple switching or team track delivery."

VI.

ALTHOUGH SECTION 6(7) OF THE ACT MAY BE VIOLATED BY THE PERFORMANCE OF TERMINAL SWITCHING SERVICES WITHOUT COMPENSATION IN ADDITION TO THE LINE-HAUL RATES, EVEN THOUGH THE TARIFFS SPECIFICALLY PROVIDE THAT THE PERFORMANCE OF SUCH TERMINAL SWITCHING SERVICES IS INCLUDED UNDER THE LINE-HAUL RATES, THERE CAN BE SUCH VIOLATION ONLY IF THE LINE-HAUL RATES *DO NOT INCLUDE COMPENSATION* FOR SUCH TERMINAL SWITCHING SERVICES, AND THERE CAN BE NO VIOLATION IF THE LINE-HAUL RATES *ALREADY INCLUDE SUCH COMPENSATION.*

Section 6(7) of the Act is quoted verbatim pp. a-1 and a-2 of Appendix A to this brief. As is there shown, that Section, after providing that no carrier shall engage in transportation unless its rates, fares and charges have been filed and published, then provides:

> "* * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device, any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariff."

If it were a matter of first impression, it might be assumed from a literal reading of that Section, that whatever other sections of the Act might be violated, Section 6(7) of the Act could not be violated, by the *compliance* of a carrier with the provisions of its published tariffs, no matter what such provisions might be, but could only be violated by a *departure* from such provisions.

Accordingly, it might be assumed that Section 6(7) of the Act would not be violated by the *compliance* of a carrier with the express provisions of its tariffs, either by performing terminal switching services which its tariff specified as included in its line-haul rates, or by paying an industry an allowance provided in such tariffs for performance of such terminal switching services by the industry, *even though its line-haul rates did not include compensation* for such terminal switching services.

This question, however, is no longer a matter of first impression. The decisions of this Court, already referred to, in the *American Sheet and Tin Plate* case, *supra*, in the *Pan-American Petroleum* case, *supra*, and in the *Staley*

case, *supra*,* make clear that a carrier can violate Section 6(7), *even by compliance with its tariffs*, if such compliance in fact results, as found in the *Staley* case, in affording an industry "a preferential service not accorded to shippers generally", and, therefore, results in "a prohibited refunding or remitting of a portion of the tariff rates."

It has just been shown, however, under Point V of this brief, that in all prior decisions of this Court, where this Court has sustained orders of the Commission, based on such violations of Section 6(7), the record before this Court has shown findings by the Commission, supported by adequate evidence, that the line-haul rates *did not include compensation* for the terminal switching services there in question.

Moreover, in all the prior decisions of this Court referred to under Point V of this brief, except in the *Corn Products* case, *supra*, the tariffs expressly provided for the allowances paid to the industries, but in all such cases, as just noted, the record showed that the line-haul rates *did not include compensation* for the terminal switching services covered by such allowances.

The *Corn Products* case, *supra*, as there shown, was not an allowance case, but was a case where the carriers themselves performed the terminal switching services in question. The record there showed, however, that the tariffs did not *expressly* provide for the performance of such terminal switching services under the line-haul rates, and showed, moreover, as found by the Statutory Court, that the line-haul rates *did not include compensation* for such terminal switching services.

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*See also *Baltimore & Ohio R. Co. v. United States*, 305 U. S. 507.

Appellees, therefore, submit that from the prior decisions of this Court, it must be clear that where a carrier's performance of such services is in compliance with the express provisions of the carrier's tariffs, Section 6(7) can be violated only if the line-haul rates *do not include compensation* for the performance of such terminal switching services.

It would seem self-evident that if the line-haul rates do include compensation for the performance of such terminal switching services, there can be no violation of Section 6(7) since there can be no preferential service to the industry in question "not accorded to shippers generally", since the industry, in paying the line-haul rate, pays full compensation to the carrier for both the line-haul service and the terminal switching service. For the same reason, there can be no "prohibited refunding or remitting of a portion of the tariff rates".

The only difference between the treatment by the carrier of such an industry and of other industries, is that the carrier, by publishing in its line-haul rates aggregate charges for the combined line-haul and terminal switching services, requires the industry in question to pay full compensation for both services in the line-haul rates, while other industries are required to pay the same relative aggregate compensation, segregated as between line-haul and terminal switching services. If any correction of such a situation is necessary, the Commission has jurisdiction to correct it under Section 6(1), by merely requiring the segregation in the tariffs of the charges for the line-haul service from the charges for the terminal switching services.

Whether or not the line-haul rates *include compensation* for the terminal switching service is clearly determina-

tive, both in law and in common sense, of whether the Commission can require the carriers to collect and the industry to pay charges in addition to the line-haul rates for such terminal services. If the line-haul rates already *include compensation* for such terminal services, neither under Section 6(7), or any other section of the Act, can the Commission compel the carriers to collect, and the industry to pay charges in addition to the line-haul rates for such switching services. To do so would be to compel the carriers to collect, and the industry to pay twice for the same services, which would plainly violate, among other things, Section 1(5)(a) of the Act.*

On the other hand, if the line-haul rates *do not include compensation* for the terminal switching services, the Commission can under Section 6(7), *upon so finding and with evidence to support such finding*, require the carriers to collect and the industry to pay, charges in addition to the line-haul rates, which will be reasonably compensatory for such switching services.

VII.

THE RECORD FULLY SUSTAINS FINDINGS OF FACT 13 AND 14 OF THE STATUTORY COURT (R. 455-456), WHICH ARE IN SUBSTANCE:

(A) THAT THERE WAS NO EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT THE "PLANT YARD" AT GARFIELD AND THE "FLAT YARD" AT LEADVILLE CONSTITUTE REASONABLY CONVENIENT POINTS FOR DELIVERY TO AND RECEIPT FROM THE

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*Section 1(5)(a) is set out verbatim in Appendix A. to this brief.

RESPECTIVE SMELTERS OF CARLOAD FREIGHT BY THE APPELLEE CARRIERS.

(B) THAT ON THE CONTRARY, THE ONLY EVIDENCE BEFORE THE COMMISSION WAS THAT SUCH CARRIERS, IN ACCORDANCE WITH THEIR PUBLISHED TARIFFS, HAVE FOR APPROXIMATELY FIFTY YEARS DELIVERED AND RECEIVED CARLOAD FREIGHT AT ACTUAL POINTS OF LOADING AND UNLOADING AT THE RESPECTIVE SMELTERS, AND HAVE NEVER DELIVERED OR RECEIVED CARLOAD FREIGHT AT THE POINTS DESIGNATED BY THE COMMISSION.

(C) THAT THERE WAS NO EVIDENCE BEFORE THE COMMISSION TO SUPPORT ITS FINDINGS THAT THE TRACKS AT SUCH DESIGNATED POINTS CONSTITUTE THE INDUSTRIAL TRACKS OF THE APPELLEE INDUSTRY.

(D) THAT ON THE CONTRARY, THE ONLY EVIDENCE BEFORE THE COMMISSION WAS THAT THE TRACKS AT SUCH DESIGNATED POINTS CONSTITUTE THE ONLY AVAILABLE RAILROAD TERMINAL FACILITIES OF THE APPELLEE CARRIERS FOR THEIR ORDINARY RAILROAD TERMINAL HANDLING OF CARLOAD FREIGHT TO AND FROM SUCH SMELTERS.

The testimony of Mr. Moriarty, Superintendent of the Salt Lake Division of the D. & R. G. (R. 883-900) and the testimony of Mr. Dangerfield, Weighmaster of the appellee's Garfield smelter (R. 1023-1025), shows that the so-called "plant yard" at Garfield consists of ten parallel tracks, Nos. 1 to 10 inclusive, and two additional tracks known as No. 1 rip track and No. 2 rip track; that these ten tracks in reality constitute the joint railroad terminals of the three carriers who served the Garfield plant at the time of the hearing, these being the D. & R. G., the Union Pacific and

the Bingham & Garfield;* that the principal use of such tracks is to break up the inbound road-haul trains and to make up the outbound road-haul trains of the respective carriers, and hold outbound loads and empties for the making up into such trains and inbound loads and empties for spotting the industry; that, in addition, a portion of track No. 9 and the two so-called "rip tracks" are used by the appellee carriers either as repair tracks or as storage tracks for their bad order cars, and that adjacent to each of these tracks each of the appellee carriers maintain its own repair shop.

Mr. Moriarty specifically testified (R. 898) that none of the three carriers had any other terminals in the vicinity of the Garfield smelters at which they could perform their ordinary railroad terminal services, and that on account of the terrain could not have any such terminal yards in the vicinity of Garfield.

Mr. Moriarty having testified that the road-haul engines of the respective carriers cut off from, and coupled on to their road-haul trains at these tracks; after the switching engine of the D. & R. G. had made up or broken up their road-haul trains on such tracks, was questioned (R. 902) as to whether, even if the Railroad Brotherhoods would permit the carriers to use their road-haul engines for making up and breaking up their road-haul trains, and for weighing and

*The Commission between the time the Statutory Court granted its temporary injunction on November 14, 1947, and the time when the Statutory Court granted its permanent injunction on January 10, 1948, permitted the Bingham & Garfield to abandon its operations as a common carrier, and a portion of such operations, including those at Garfield, have been taken over by the appellee D. & R. G. (R. 519, 520).

spotting of cars, etc., it would be practical for such carriers to do so. He answered:

> "A. No. That is evident, that we don't do it in our own terminals, and this switching at Garfield, your weighing and all that stuff, and lining all the cars for spotting at various points and various sequence wanted is very similar to any industrial switching at any large city where your cuts must be made up in the order in which they are going to be spotted, etc., and so on, in advance of the spotting engine's arrival, to working. This is practically the same as that. The only difference is this is one industry and the other may be twenty or thirty industries.
>
> Q. In other words, Mr. Moriarty, it happens there are no other industries out here to use those joint facilities used by the three railroads?
>
> A. That is right.
>
> Q. *But that is no different than any joint terminal, any joint railroads may maintain in any terminal district?*
>
> A. *Or you might say a terminal used by any other railroad.*"

Moreover, the Commission's witness, Mr. MacDonald, testified in these respects as follows (R. 928):

> "Examiner Way: Now these tracks at the bottom of the map here, which you have just referred to, the ten storage tracks, those were the ones that were designated the receiving yard, and they are the storage tracks?
>
> Mr. MacDonald: Been designated as a receiving yard, joint railroad terminal and the storage yard. *That might possibly be referred to as the interchange yard* somewhere in our reports."

Mr. Finerty: *But if so, Mr. MacDonald, it would be interchange between the three railroads?*

Mr. MacDonald: *That, of course, would be the reason for calling it interchange."*

The real nature of the so-called "flat yard" at Leadville is shown in the testimony of Mr. Moriarty (R. 1081-1094), Mr. MacDonald (R. 1103-1105) and the testimony of Mr. Hennebach, Superintendent of the Leadville smelter, (R. 1114, 1124-1126, 1130).

It there appears that the so-called "flat yard" consists of seven tracks designated as such on Exhibit 32. It appears, however, that these tracks while located on the smelter property are, unlike the "plant yard" at Garfield, owned and maintained by the appellee D. & R. G. It further appears that a portion of the main line of that appellee carrier between Leadville and Malta, as well as a portion of its Ore & Chemical Company spur, are also located on the smelter property.

It further appears that the "flat yard" tracks are not only owned and maintained by the D. & R. G., but that they are used by that appellee carrier for the handling of inbound and outbound cars for independent shippers and consignees, including those of the Ore & Chemical Company, the Resurrection Mill, and of independent shippers of ore and scrap iron.

It also appears that such tracks are the point at which the road-haul engines of the D. & R. G. cut off and couple on from its road-haul trains, and are used for the storage of empty and loaded cars, inbound and outbound, both of the smelter and of such independent shippers.

As shown in Appendix B, by the uncontradicted testimony of Mr. Williams and Mr. Carey, the appellee carriers

have never received or delivered cars to the appellee industry at either the "plant yard" at Garfield or the "flat yard" at Leadville, but since the inception of the traffic have always received or delivered cars to and from the appellee industry at the points of actual loading or unloading on the smelter tracks beyond such "plant yard" or "flat yard". It further appears from the testimony of Mr. Williams and Mr. Carey that since 1908 the tariffs of the appellee carriers have always specifically provided for receipt and delivery at the actual point of loading or unloading on the tracks of the respective smelters.

Once again the Commission did not challenge the foregoing testimony either by cross examination or by rebuttal testimony, and there is no testimony contrary to the foregoing anywhere in the record.

It would seem too obvious to need further argument that, as the Statutory Court has expressly held, the Commission's findings (R. 374) that the "plant yard" at Garfield and the "flat yard" at Leadville are "reasonably convenient points for the delivery and receipt of carload traffic moving to and from the smelters of the appellee industry", are without any evidence to support them, and that the only evidence of record is that such points constitute, on the contrary, the only available terminal yards of the appellee carriers.

It must further be apparent that the "plant yard" at Garfield and the "flat yard" at Leadville are neither factually or legally comparable to the so-called "interchange tracks", which the Commission had held to be convenient points for the receipt and delivery of carload shipments to and from the respective industries involved in the prior orders of the Commission which this Court has affirmed in its decisions discussed under Point V of this brief.

What is vitally important, however, in these findings of the Commission that the "plant yard" at Garfield and the "flat yard" at Leadville are reasonably convenient points for the delivery and receipt of carload traffic to and from the smelters of the appellee industry, is that, *under the Commission's order* requiring the appellee carriers to cease and desist from performing *any* terminal switching services beyond such points *without compensation in addition to the line-haul rates,* the appellee industry *is, thereby, deprived even of the equivalent "of simple switching or team track delivery"* under such line-haul rates, which is a *direct violation* of the Commission's *own general formula in its Basic Report.*

VIII.

THE SUGGESTION IN THE COMMISSION'S BRIEF, pp. 77-79, THAT THE RECORD UPON WHICH THE STATUTORY COURT BASED ITS ORDER OF INJUNCTION APPEALED FROM, IS INSUFFICIENT BECAUSE IT DOES NOT CONTAIN THE RECORD UNDERLYING THE COMMISSION'S BASIC REPORT IN *EX PARTE 104, PART II,* REPRESENTS EITHER A BREACH OF FAITH WITH THE STATUTORY COURT AND THE APPELLEES OR, AS APPELLEES PREFER TO BELIEVE, A MISUNDERSTANDING BY THE COMMISSION OF THE ISSUES INVOLVED ON THIS APPEAL.

In order to avoid any such question as arose in the *Corn Products* case, 59 F. Supp. 867 (affirmed on motion, 331 U. S. 790), as to whether it was necessary in passing on the validity of a supplemental order of the Commission under *Ex Parte 104, Part II,* for the Statutory Court, and ultimately for this Court, to have before it the entire record

in *Ex Parte 104, Part II*, upon which the Commission made its Basic Report, appellees took the following precautions:

Mr. Finerty, acting as counsel for all appellees before the Statutory Court, on the hearing before that Court of July 14, 1947, resulting in that Court's earlier temporary injunction of November 14, 1947, raised the question (R. 499-502) whether counsel for the Interstate Commerce Commission and for the United States would agree that, under the issues presented by the appellees before the Statutory Court, it would be unnecessary for that Court to have before it the original record before the Commission underlying its Basic Report. As there appears (R. 500-501), that record as printed and filed with this Court in *United States v. American Sheet and Tin Plate Co., supra*, consists of over 15,000 printed pages, and cost $35,000 to print. In the course of that discussion, Mr. Finerty stated (R. 500):

> "Mr. Finerty: I want to state, to make my position entirely clear, *that I concede the conclusions in the general report—what we call the basic report*—209 I. C. C. 11, as to the customary and reasonable terminal switching services included in the line-haul rates are not challenged here so far as they apply to the facts stated in the basic report, and I will, of course, attempt to distinguish those facts from the facts here * * *."

The discussion then terminated as follows (R. 501-502):

> "Judge Phillips: I think it is perfectly clear that Mr. Finerty accepts the report and starts his case with the supplemental hearings, and so long as that position obtains there is no reason why we should have this other. *If there develops in the case any reason why we must have it or should consider it*—

here, we can have it. That question can (not) be raised on the face of what is now presented. I see no reason for it.

"Mr. Dumbauld: I may say in the Hanna Furnace Company case I think they did present the entire original record, as well as the supplemental record. It has been done, *but I agree if counsel takes the position that he is not challenging the basic record, it is entirely unnecessary to burden the Court with it at this time.*

"Mr. Crenshaw: *I am quite sure from my experience in the Corn Products case that it is not necessary to have that record here. We are not insisting upon it.* I have tried the Wabash case, 321 U. S., and the Corn Products case; I tried them both. We didn't have that general record in either one. The effect of the ruling in the Corn Products case was to say that (it) is no more needed in that case because the law and the facts have already been decided by the Supreme Court. *So this Court in this case doesn't need to be concerned with it.*

"Judge Phillips: I think that is right."

Upon the hearing before the Statutory Court of October 18, 1948, resulting in the permanent injunction of that Court of January 10, 1949, here appealed from, it was expressly stipulated (R. 517, 518) that the entire record in the prior hearing before the Statutory Court of July 14, 1947, resulting in the earlier temporary injunction order of that Court, should be incorporated as part of the record in the hearing upon such permanent injunction. Appellees, and obviously the Statutory Court, assumed that thereby the stipulation in the prior hearing on the temporary injunction, that it was unnecessary to have before the Court the record underlying the Commission's Basic Report, carried over to

the subsequent hearing on the permanent injunction here involved. No indication to the contrary was at any time subsequently given during that hearing by counsel for appellants, nor was any such question raised by them in their suggested Findings of Fact and Conclusions of Law which they requested (R. 446-448), or in their objections to the Findings of Fact and Conclusions of Law submitted by appellees, and ultimately made by the Court. Appellants first raised any question in this respect in their Assignments of Error filed in the District Court, March 7, 1949, coincident with the filing of their petition for the allowance of this appeal to this Court (R. 466-468). It was there raised by appellants' Assignment of Error No. 9 (R. 467), as follows:

> "9. In finding that the record before the court included the entire evidence before the Commission in the proceedings before it, when in fact the record before the Commission in *Ex Parte No. 104* upon which its basic report, 209 I. C. C. 11, was based, was not put in evidence before the court, but merely the records made in supplemental proceedings relating to the operating practices at plaintiffs' respective plants."

No such question in this respect was raised, however, by appellants' jurisdictional statement, nor is any such question specifically raised in their "Statements of Points to be relied upon", filed in purported compliance with Paragraph 9 of Rule 13 of this Court, but which in reality consists of a mere blanket statement reading:

> "Come now the appellants and say that they will rely in brief and oral argument before this court on the points made in their assignments of errors on their appeal in the above-entitled causes."

Finally, no such question is presented in the brief filed by the United States on this appeal, but is raised solely in the brief of the Interstate Commerce Commission.

Appellees prefer to believe that what otherwise must thus appear to be a breach of faith not only toward appellees but toward the Statutory Court, in the raising of this question by the Commission on this appeal, is in reality accounted for by some misapprehension on the part of counsel for the Commission that either the Findings of Fact and Conclusions of Law of the Statutory Court in connection with its permanent injunction here appealed from, or the contentions of appellees on this appeal, in some way involve an attack upon the findings and conclusions of the Commission in its Basic Report. The express concession, heretofore made by the appellees, that for the purposes of this appeal it may be assumed that the terminal switching services performed by the appellee carriers at the smelters of the appellee industry are in excess of "uninterrupted simple switching or team-track delivery", it is hoped will remove any misapprehension of counsel for the Commission in this respect. Appellees here desire to emphasize that nothing in the order of the Statutory Court, or in the Findings of Fact and Conclusions of Law on which that order was based, or in the contentions of appellees on this appeal, involves any question as to whether the record before the Commission, on which it founded its Basic Report, was sufficient to sustain the Commission's Findings and Conclusions in such Basic Report, and therefore that such record would be entirely irrelevant and superfluous on this appeal.

Conclusion

In conclusion, it would seem superfluous to point out more than the following:

(1) That appellees resorted to the courts only after they had failed to get, despite exhaustive efforts, any real consideration by the majority of the Commission, either of the uncontradicted and unchallenged evidence of record that the line-haul rates of the appellee carriers *include compensation* for *all* terminal switching services here involved at the smelters of the appellee industry, or of the legal effect of such evidence.

(2) That thereupon the Statutory Court found that there was no evidence to support the Commission's findings that such line-haul rates *do not include compensation* for the terminal switching services in question, but that the sole evidence was to the contrary.

(3) That the Statutory Court, over the protests of appellees, thereupon granted in the first instance only a temporary, instead of a permanent injunction, against the order of the Commission of October 14, 1946.

(4) That moreover, in so doing, the Statutory Court remanded the proceedings to the Commission for the expressed purpose of affording the Commission an opportunity, either (a) to show by further hearings that the line-haul rates *do not include compensation* for such terminal switching services and thereby to justify an order under Section 6(7), requiring charges *in addition to the*

line-haul rates for such services, or (b) to make a new order under Section 6(1), merely requiring the segregation in the tariffs of the line-haul charges from the terminal switching charges, *without any increase in the aggregate rates.*

(5) That the Commission took no appeal from such order and mandate of the Statutory Court. Instead it set aside its temporarily enjoined order of October 14, 1946, and reopened the proceedings before it for "reconsideration *on the present and existing record.*

(6) That, thereupon, the Commission made its here enjoined order of May 18, 1948, without adopting either of the alternatives afforded it by the prior mandate of the Statutory Court. Instead, without further hearing, it *expressly repudiated* its former finding that the line-haul *rates do not include compensation* for such terminal switching services, and expressly undertook to make its new order without any finding whatever in this respect.

(7) That such order, in connection with the finding upon which it is made, purports to require, under Section 6(7), that the appellee carriers make charges *in addition to the line-haul rates* for *all* terminal switching services at the smelters of the appellee industry, though it now has become *res adjudicata* on this record, and the Statutory Court has expressly so found, that such line-haul rates *already include compensation* for *all* such terminal switching services.

Appellees, therefore, respectfully submit that this Court should affirm the judgment and order of the Statutory Court,

here appealed from, since otherwise on this record, under the Commission's enjoined order, appellee carriers would be required to collect, and appellee industry required to pay, twice for the same services.

Respectfully submitted,

OTIS J. GIBSON,
ELMER B. COLLINS,
JOHN F. FINERTY,
Counsel for Appellees.

APPENDIX A

RBATIM QUOTATIONS OF PERTINENT PRO-ISIONS OF INTERSTATE COMMERCE ACT REFERRED TO IN THIS BRIEF.

. 1(5)(a):

"(5)(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

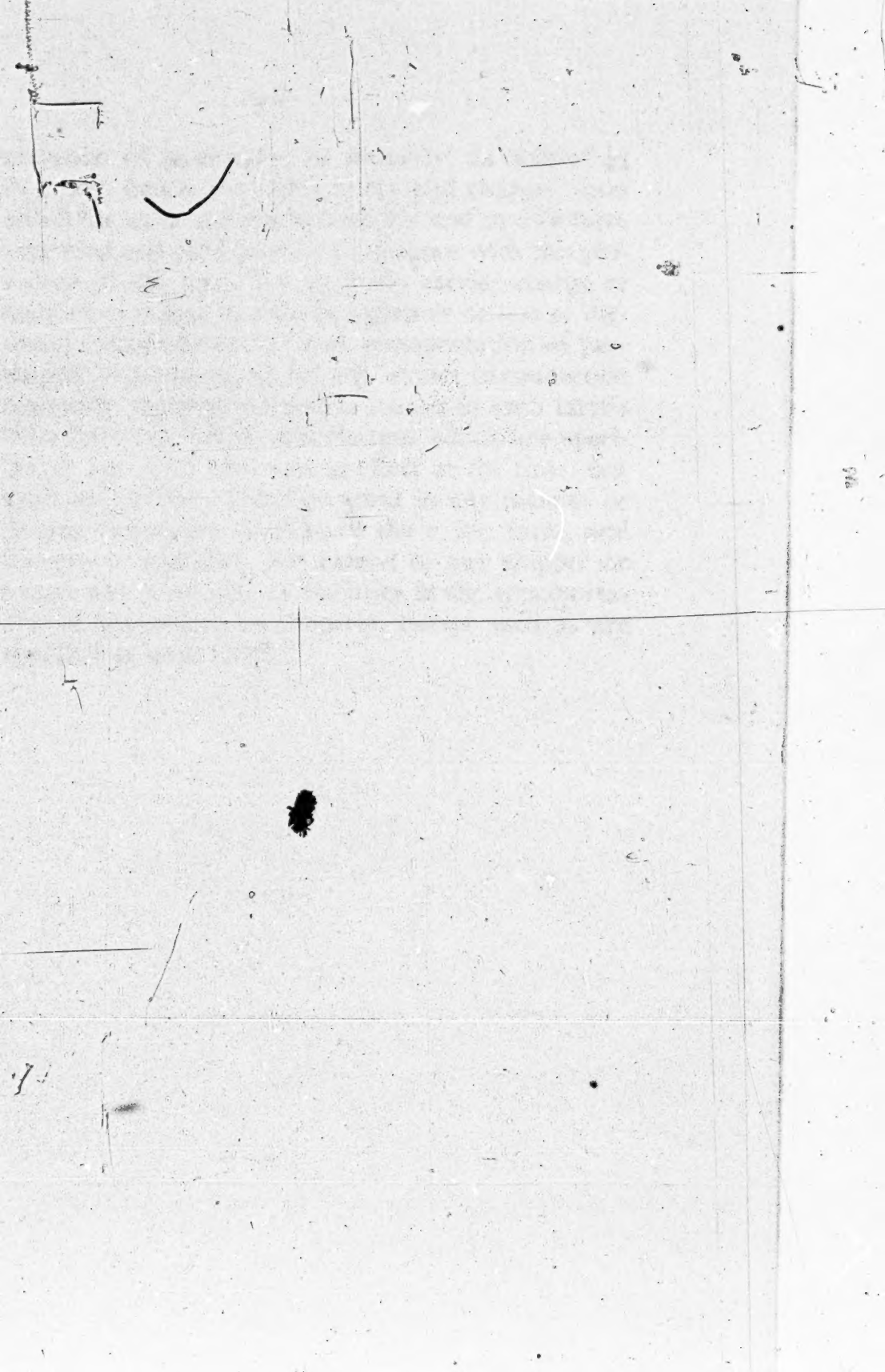
. 6(1):

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, *and shall also state separately all terminal charges*, storage charges, icing charges, and all other charges *which the Commission may require* * * *". (Italics supplied.)

. 6(7):

"(7) No carrier, unless otherwise provided by this part, shall engage or participate in the trans-

portation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariff."



APPENDIX B

ABSTRACT OF TESTIMONY OF MR. WILLIAMS AT HEARING OF MAY 19, 1932, AND OF MR. CAREY AND MR. TUCKWOOD AT HEARING OF MAY 26 AND 27, 1944.

Abstract of testimony at hearing of May 19, 1932, of Mr. George Williams, then Traffic Manager of appellee, D. & R. G.

Mr. Williams testified (R. 554-555) on direct examination by counsel for the D. & R. G., Mr. Gallagher, that it was necessary for the carrier to get the weights over the industry's scales on inbound shipments of non-ferrous ores and concentrates, because the carrier could not practicably maintain scales at all the producing mines;* that such commodities also moved on line-haul rates graded according to actual value. He testified (R. 556) that as shown by his Exhibit W-1, (R. 574), that under Item 1670 of the D. & R. G. tariff, delivery of line-haul carload shipment at Garfield included movement within smelter plant over track scale to and from thaw house, to and from a smelter, sampler, or to and from a combination sampler and concentrator to a designated point indicated by the sampling company (the smelter), without charge in addition to the line-haul rate. He further testified that under the same Item, for each additional intraplant movement from track to track within the smelter, a charge would be made of $2.70 per car. He also called attention to the fact that under Items 1680 and 1690 of the tariff, concentrates and sand originating on the Bingham and Garfield Railroad, the D. & R. G. would assess switching charges specified in the tariff for delivery of such cars. *On cross examination by counsel for the Commission, Mr. Gwynn,* he testified as follows (R. 558-561):

*Tariffs provide that for this reason commodities shall move under destination weights, Exhibit 15, witness Tuckwood (R. 319).

Q. (By Mr. Gwynn) Going back to item 1670, also 1680, the respondent company has collected certain charges for performing switching services upon certain shipments within the plant of the American Smelting & Refining Company. Now can you distinguish between those shipments and the shipments which the respondent considers its duty to spot free of charge as part of the transportation service under the line haul rates?

A. Yes.

Q. What is your distinction?

A. Take a carload of ore originating at, say, Eureka, Utah, going to the Garfield smelter; if we handle that carload of ore in the winter time it may be frozen; we would take the car to the scales first, then take it to the thaw house and thaw it, on the theory we had not completed our transportation until we have delivered the shipment in shape for unloading. Now, having completed that, we are through with that performance. If the industry wants something else done, then the two dollar and seventy cent per car charge as published would be assessed.

Q. That is, after you have taken the car to the thaw house and the ore is thawed out ready to unload——

A. Yes, sir.

Q. —you consider you should collect two dollars and seventy cents for spotting the car in the plant where the plant wishes to unload it?

A. When we specifically provide in this item what we determine is a part of our road haul common carrier service for delivery, if there is additional service then we would make the charge as published. Now, my explanation goes to this, the answer as to why we consider our common carrier duty is not fully met with when we make delivery in the yard or up to the plant of the smelter of a carload of frozen ore.

Q. In other words, if the ore was not frozen you could take it to the smelter without first taking it to the thaw house, and that service would be included in the line haul rate, and you would not collect the two dollars and seventy cents?

A. Correct.

Q. But if you are required to take it to the thaw house first, you would assess the additional charge of two dollars and seventy cents for completing the spotting service?

A. Let me put it this way—I don't think we are thinking along the same line, exactly—When we bring a carload of ore or concentrates into the smelter yards we have to get the weight first, we have to get an assay certificate; we will perform switching service for the purpose of scaling the car; we will take it to the sampling plant for the purpose of the assay; if it is in the winter time we will take it to the thaw house to have the ore thawed out.

Q. You will do both services?

A. All those are included in our line haul rate. Does that make a clear answer to your question?

Q. To complete the service you take it to the sampler and the thaw house as part of the line haul service—or part of the service under the line haul rate. Now, what else will you do with it?

A. We take it to the plant they want it unloaded. Perhaps I haven't made it clear, Mr. Gwynn, but we regard the service for weight and the service for sampling in order that we may know the value of the ore——

Q. Pardon me, this two dollars and seventy cents is an intraplant charge purely, isn't it?

A. That is purely an intraplant charge.

Exam. Bardwell: I would like the witness to finish what he was going to say. I think he was

going to say he considered that part of the common carrier service.

A. We consider the scaling of the car for the weight and the getting of the assay as part of our common carrier duty.

Exam. Bardwell: And the thawing?

A. Yes sir, and the thawing also, in the winter time.

Q. (By Mr. Gwynn) Pardon me for the interruption. Will you explain what is meant by the combination sampler and concentrator service? I believe you have given an illustration of the sampler and the thaw house service.

A. I am not familiar enough, but I should say at Garfield we would have what we would term a common sampler and concentrator, that is, a plant that is called a sampling and concentrating plant; combination of both.

Q. As I understand the two dollar and seventy cent charge is purely an intraplant charge, and item 1680 naming the charge as two dollars and twenty-five cents is something that is not an intraplant charge, is it?

A. That is correct.

Q. And inasmuch as the two dollars and twenty-five cents named in item 1680 is not an intraplant charge, will you distinguish or explain the reason why you should assess that charge and not perform the service as a part of the carrier's duty?

A. We do not receive a line haul in connection with that transaction.

Q. Do you collect that charge from the B. & G.?

A. No; from the smelter; from the industry. The B. & G., as I explained, have a freight rate of their own on the concentrates from the sampling plants at Magna and Arthur to Garfield; that freight charge must be paid before that goes to the B. & G.; then

the Rio Grande service is necessary for the switching, and we make this charge for switching the concentrates. This is in addition to their freight rate.

Q. It will appear if it was the common carrier duty of respondent carrier to spot this ore and coal in the plant, that it would be the duty of the carriers also to spot this other traffic, although I understand your carrier receives no line haul, at the same the B. & G. receives a line haul, the two carriers, the B. & G. and the D. & R. G. perform the completed service and collect from the industry a charge of two dollars and twenty-five cents, while in the case of this other traffic no charge is collected, and the respondent considers it a part of its duty to perform the service without a charge?

A. In one instance the Rio Grande gets a line haul and the freight rate, and for that freight rate they consider certain terminal service included involved in their common carrier duty. In the case of the two dollar and twenty-five cent switching charge on concentrates which the D. & R. G. receives from the B. & G., we have no line haul whatever; we perform a straight switching service on that for which we get no other remuneration.

*Q. I can see the point why the D. & R. G. would want to perform the service without receiving the line haul."**

*At the 1944 hearing in the same connection, Mr. Dangerfield, a witness for the appellee industry, testified (R. 1031) that the $2.25 switching charge made by the D. & R. G. for the delivery of cars of concentrates and sand originating on the Bingham and Garfield, was because of the short distance of the haul of the Bingham and Garfield from the originating points at Magna and Arthur on its line. He testified (R. 1017) that Magna was approximately 5½ miles and Arthur approximately 3½ miles from the Garfield smelter. In other words, this is an instance where, because of the short line haul of the Bingham and Garfield, its line-haul rate could not be made high enough to include compensation for the

(Continued p. b-6)

Mr. Williams, on re-direct examination by his counsel, Mr. Gallagher, then testified (R. 562):

> "Q. (By Mr. Gallagher) The line haul, Mr. Williams, you consider absolutely as the duty of the company to deliver the car at the unloading point, do you not?
>
> A. Yes, we have that obligation everywhere, not only at the Garfield smelting plant but at our freight houses and industries all over the system. There is, however, a difference, in my opinion, with respect to ore and concentrate traffic, which requires perhaps a little more additional so-called common carrier service than would be given to ordinary freight. That is by reason of the moisture in the concentrates and also in crude ore, and in the winter time the necessity of thawing it out before it can be unloaded. There is also, as I previously explained, the need of our getting the weights and the need of our getting assay certificates in order to compute our freight charges. We can not do it without computing the weight and the valuation of the ore."

On re-cross examination by the Commission's counsel, Mr. Gwynn, Mr. Williams testified as follows (R. 563):

> *"Q. (By Mr. Gwynn) If the line haul rates of the B. & G. on the items of traffic designated in item 1680, 1690 and 1700 were made in contemplation of the same service as the D. & R. G. makes its line haul rates on iron ore, coal and other traffic, the*

---

terminal delivery by the D. & R. G. at the Garfield smelter, of shipments originating at such short haul points. On the other hand, as Mr. Gwynn, counsel for the Commission, remarked at the 1932 hearing (R. 561), he could understand why the D. & R. G. would not perform the delivery without charge since it had not received the line-haul.

industry would be entitled to this terminal service without a charge, wouldn't it?

A. If they made them in the same way, but they do not; they can not."

Abstract of Testimony of Mr. W. M. Carey, Freight Traffic Manager of The Denver and Rio Grande Western Railroad Company at Hearing of May 26 and 27, 1944.

Note: Mr. Carey and Mr. Tuckwood both introduced exhibits showing the tariff history of the provisions of the line-haul rates applying at Garfield and Leadville, including within such rates the terminal switching services here in question. These exhibits are Mr. Carey's Exhibit No. 4 (R. 1132-1152) and Mr. Tuckwood's Exhibits Nos. 10, 11, 12 and 13 (R. 1243-1315)

Throughout the proceedings before the Commission, the following tariff provisions from those exhibits have been accepted as representative.

Effective 1908 until February, 1920:

> "Switching from track to track within smelter plants served by the Denver and Rio Grande Railroad all cars containing freight which has paid transportation charges to the plant . . . free."

Effective February 25, 1920, the tariffs were changed to provide as follows (Exhibit 10, p. 1)

> "ITEM #15—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH
>
> Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah will include *one movement* of Commodity within a smelter plant over track scales to and from smelter sampler (or to and from combination

sampler and concentrator), to a designated unloading point indicated by the Smelting Company." Italics supplied)

"ITEM # 20—INTRA-PLANT OR INTERNAL SWITCHING AT SMELTERS IN COLORADO AND UTAH

From track to track within smelter plant for each additional movement not provided for in Item No. 15, $2.50 per car (see also Item No. 10)."

Effective November 27, 1920, the tariffs were corrected to read as follows (Ex. 10, p. 2):

"ITEM # 15-A—INITIAL OR DELIVERY SWITCHING AT SMELTERS IN COLORADO AND UTAH

Delivery of a line haul carload shipment, destined to smelters at Durango, Leadville, Pueblo, Blende and Salida, Colorado, Garfield, Murray and Midvale, Utah, will include *movement* of a commodity within a smelter plant over track scales, *to and from thaw-house*, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company." (Italics supplied.)*

Mr. Tuckwood's Exhibit 13 shows that the foregoing provisions of Item 15-A for inclusion within the line-haul rate of the switching charges there specified, are still carried without change in the tariffs presently effective at the Leadville smelter. (See Item 1370, p. 19 of Ex. 13.)

*It will be noted that neither this tariff provision nor the immediately preceding one of February 25, 1920, provided for any greater terminal switching services under the line-haul rates than were provided by the carriers' tariffs prior to 1920. On the contrary these tariff changes in 1920 imposed charges for *intra-plant switching*, which the tariffs from 1908 to 1920 had provided for without any charge in addition to the line-haul rates.

Effective July 5, 1938, the tariffs at Murray and Garfield were changed to read as follows (Ex. 10, p. 11; Ex. 11, p. 4; Ex. 12, p. 7):

"*Item 2322*

(a) The line-haul rate includes movement of loaded cars to track scales and subsequent delivery to any designated track within the plant which can be accomplished by one uninterrupted movement (see note), *from the road-haul point of delivery to the switching line*. Any additional movement within the plant (except as noted below) will be charged for at $1.00 per car for each such movement.

NOTE—By 'uninterrupted movement' is meant one continuous movement of switching locomotive and crew, without interruption, *resulting from orders from, or requirements of, the smelter*.

(b) During the winter months when ore or concentrates are delivered to the smelting plants in a frozen condition, the switching carrier at the request of the smelting company will switch cars containing frozen ore or concentrates to and from the house at a charge of 50 cents per car. After thawing, the cars will be switched to the track scales for weighing and subsequently to the sampler or other designated location within the plant as provided in Paragraph (a) hereof.

(d) In the event the smelting company shall demand the weighing of empty cars on its own track scales, on either inbound or outbound movements, the service of switching the cars to and from track scales for such light weighing shall be charged for at 50 cents per car." (Italics supplied.)

(e) The line-haul rate will also include the outbound movement of loaded cars from point of loading to track scales for weighing and subsequent movement by the switching line to road-haul carrier without interruption resulting from orders from, or requirements of the smelter."

In connection with these tariff provisions, Mr. Carey testified as follows (R. 912):

"Mr. Carey: I would like to elaborate on certain portions of these exhibits. As I stated before, prior to February 25, 1920, free switching was given within these plants on all freight which had paid transportation charges to the plant, and effective on that date a charge for intra-plant switching of $2.50 per car was provided, and that up to June 25, 1938, on intrastate traffic and July 5, 1938, on interstate traffic, the tariff provisions remained the same, with the exceptions of the fluctuations made necessary by decisions of the Commission in various ex parte proceedings. Now, with respect to the change that was made in June and July, 1938, I would like to state that while it was felt at the time these changes were made, the findings of the Commission of May 14, 1935, in Ex Parte 104, Part II, Terminal Services, required these changes, it is my thought in view of the particular circumstances surrounding the terminal services performed at these smelters, which differs from any other with which I am familiar, the Commission should give the question further and individual consideration. The railroads now allow free movement over the scales on line-haul traffic.

Exam. Way: In other words, it is your thought that the free service should be reinstated under the line-haul rates.

The Witness: For that portion of those services that are in order to assess their freight charges.

Exam. Way: In other words, you mean the weighing of the cars and the movement for sampling.

The Witness: Yes, sir.

Mr. Finerty: And thaw house if necessary.

The Witness: Yes, sir.

Mr. Finerty: I then understand one spotting, after those things have been accomplished.

The Witness: That is right."

Mr. Carey then testified further as to the switching movements necessary to determine value of ores and concentrates, the necessity of determining such value, both from the point of view of the carriers and the industry, and the necessity of rates based on actual value in order to permit the movement of low grade ore from marginal mines. He testified (R.-912-915):

"Mr. Carey: By referring to pages 10, 11, and 16 of the exhibit (Exhibit 4), it will be noted that in addition to having the weights, the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the smelters did not. In the latter event, in all probability after the railroad had performed for itself the operation over the scales, through the thaw house, and through the sampler, a free movement to a designated point of unloading would be accorded providing that movement could be accomplished with-

out interruption, resulting from orders from or requirements of the smelter. So, as I say, it is my thought that because of the fact that the railroads have to have this information, in order to assess their freight charges, that the smelting company should be accorded this free movement through the sampler and to the first designated point of unloading.

Exam. Way: Now, I have noticed in some instances where the shipments are moved to the thaw house. For example, that is, they are weighed, they move to the thaw house, and then they are moved back over the scales. It is your thought that the plant should be accorded more than one scaling?

The Witness: Yes, for this reason, that it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. After it has gone through the thaw house—Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, because that is necessary, not only for the railroad to have the actual weight of that ore, but the smelters too, in their settlements with shippers.

Exam. Way: But what you haul, you haul the wet weight?

The Witness: We assess our charges on the wet weight.

Mr. Finerty: Based on a dry weight valuation?

The Witness: That is right.

Mr. Finerty: Translated into a wet weight?

The Witness: Yes.

Exam. Way: And that necessitates weighing twice?

The Witness: That is right.

Exam. Way: That also necessitates placing the car to the sampler for sampling?

The Witness: Yes, sir.

Exam. Way: I don't assume you are the proper witness to ask about that, the servicing, but in any event, it includes the sampling, whatever service is necessary in the sampling?

The Witness: That is right, in order to ascertain the correct value.

Q. (By Mr. Campbell) Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

Q. So it would have to build them and maintain them for those purposes?

A. Yes.

Exam. Way: Now, that contemplates the service that is satisfactory with the present method of making the rates. Is there any other way to make the rates so that the rates will cover the service?

The Witness: No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that

there wouldn't be any movement of the low grade ore, and the same thing would result.

Exam. Way: Why?

The Witness: Because the ore couldn't afford to pay the higher freight charge, the low grade ore.

Mr. Finerty: In other words, the small miner and the small mine producing a fairly low grade ore could not afford to produce that ore if you had your rates on a single-rate basis?

The Witness: That is correct.

Mr. Finerty: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

The Witness: That is right.

Mr. Finerty: And a declared value would let the big miner get the same transportation as the low grade ore and at the same time put the low grade ore mine out of business?

The Witness: I say in connection with that it would result in the railroads not getting the higher rates on this high-valued ore.

Mr. Finerty: Also it would mean there would be no inducement to the smelter to buy low-grade ore if it had to pay the same freight rate as on high-grade ore?

The Witness: That is right, only as a matter of getting trucks.

Mr. Finerty: Yes.

Abstract of Testimony of May 26 and 27, 1944, of Mr. O. W. Tuckwood, then General Traffic Manager, now Vice President of the Appellee, American Smelting and Refining Company.

Mr. Tuckwood, as already noted in this Appendix, introduced his Exhibits Nos. 10-13, inclusive. As already noted in the main brief, Mr. Tuckwood in his testimony referred to and introduced as his Exhibit 14 (R. 1315-1318) the

nreported decision of Judge Johnson of the United States District Court for the District of Utah in *Oregon Short Line Railroad Company* v. *American Smelting and Refining Company*, construing the word "free" as used in the tariffs in connection with the terminal switching services prior to 1920 as not meaning that such switching services were performed without compensation, but that compensation for them was included in the line-haul rate.

In addition, Mr. Tuckwood testified as follows in connection with the same matters covered by Mr. Carey's testimony last quoted (R. 948-950):

> "Mr. Tuckwood: * * * it is very important to point out here, that the railroad will only accept such sampler weights on the condition that the smelter uses the same weight, and that the same weight is used as the basis of settlement with shippers. Ores, concentrates, mill and smelter products all contain varying percentages of moisture, and since the smelter pays shipper on the basis of metal values on a dry weight basis the carriers cannot compute their freight charges until the moisture determination has been secured and the assay run on the dry weight basis. The carrier can then learn how much per ton, on a dry weight basis, the smelter pays the shipper. Using this smelter value the carrier can then convert the figure to a wet weight basis for the assessment of freight charges. For example, a shipment arrives at a sampler or smelter and when weighed there the net is 100,000 pounds, but there is 10 percent moisture in the material which means that the smelter will pay the shipper for 90,000 pounds of dry weight based on the metal values contained in that dry weight. Assume the assay shows the metal values to be $50 per dry weight ton, or $2,250 for the entire carload, and which is the basis of settlement with the shipper. The railroad will then compute its freight charges by converting the value to a wet

ton basis of $2,250 for the 100,000 pounds of wet material transported, which would give the railroad a value for freight purposes of $45 per ton and the rate applicable to that value would be applied to the net wet destination weight to determine the freight charges due. An accurate destination tare weight is of as great importance to the carrier as is a correct net weight in all cases where freight rates are based on smelter values.

Q. (By Mr. Finerty) Before you go into that, in other words, the railroad company receives the same rate on 10,000 pounds of water that it carries in that shipment which you mention as it receives on the ore?

A. Correct.

Q. But it receives in place of the value of the dry sample, it receives a slightly lower value based on the wet weight of the car?

A. That is correct.

Q. Therefore, it is essential for the railroad, in order to know what freight charges it can legally charge the industry to have the dry weight first determined and then translate that back to a wet basis?

A. Absolutely. A metallurgical engineer will later testify that no smelter settlement with shipper can reflect the correct values of the metals contained in a shipment unless, among other things, an actual tare weight of the car is obtained. Carriers would be compelled to revise their entire rate structure on ores, concentrates and mill and smelter products if they discontinue securing actual tare weights. The railroads in their tariffs specifically say that the rate used for waybilling, and I quote, "and rate shall be revised in accordance with such certified value." The railroads further reserve for themselves the right to verify the smelter valuation by special assay or otherwise. When a railroad publishes its rates based

on destination weights and values it must be assumed that it implies correct value and no value based on weight is correct unless all weights, gross, tare and net, are actual and accurate, and not inflated or deflated, which would happen in the case of practically each and every shipment if the stencilled tare of the car was used.

Exam. Way: And that is, you mean by that, if the stencilled weight of the car was used?

Mr. Finerty: If the weather were dry it might be the actual weight of the car would be less than the stencilled weight; if the weather were wet it would be greater than the stencilled weight.

The Witness: It would fluctuate greatly, especially with materials that contain considerable quantities of moisture.

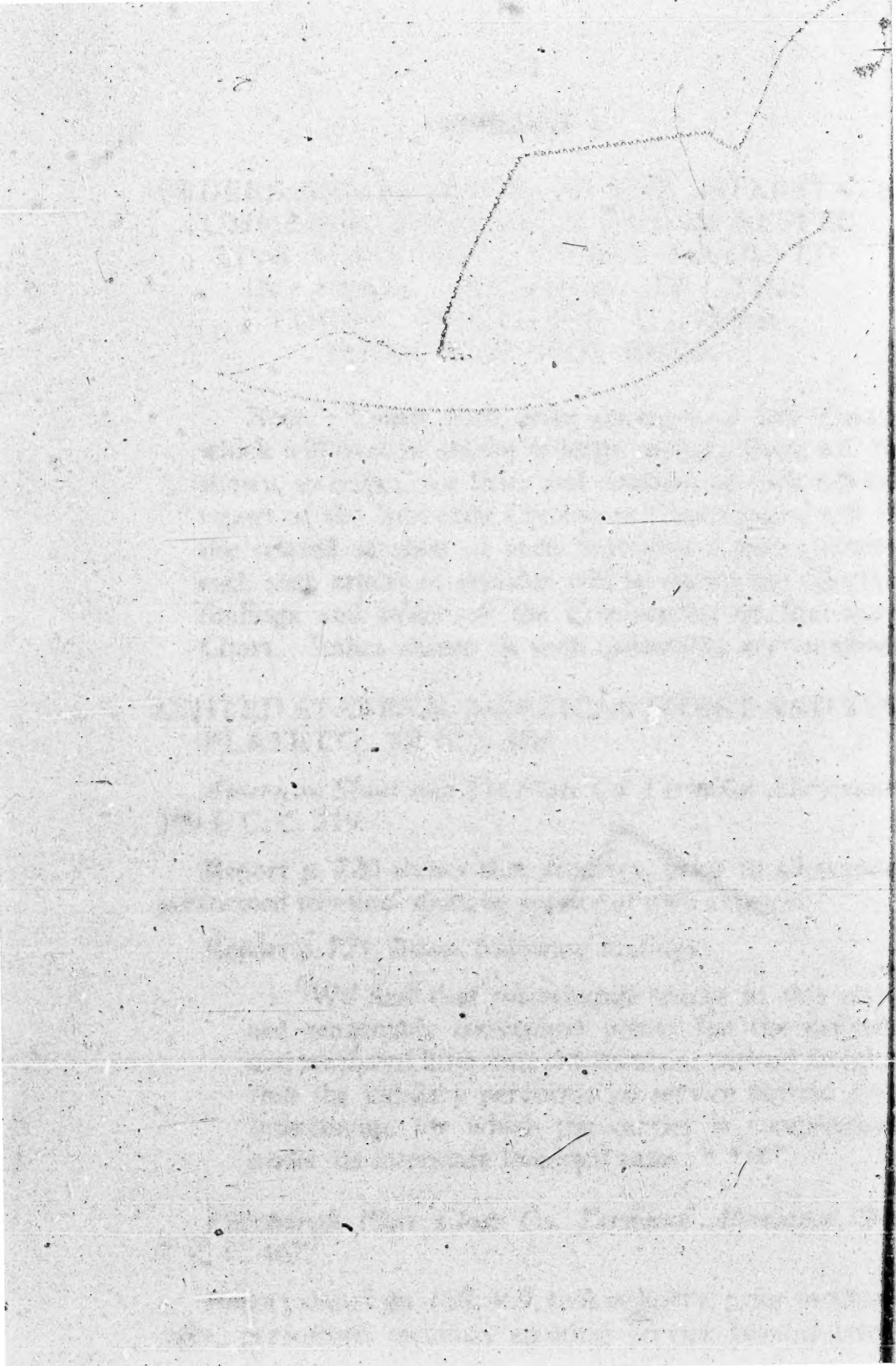
Q. (By Mr. Finerty) And you couldn't get your dry weight basis for assay?

A. You wouldn't have a correct dry weight unless you had actual weight. Therefore, the car is still in transit until all these determinations have been made.

As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built. Solid and convincing confirmation of those agreements have been carried down through the years in the tariff publication of the carriers and

is today explained in the tariff quoted in these exhibits 10, 11, 12 and 13 introduced in evidence.

The unusual nature of the non-ferrous mining, smelting and refining business requires these traditional transit privileges, and where they are provided in the line-haul rate there can be no interruptions in movement not already provided for in the orderly process of moistening, weighing, sampling and thawing when necessary and final spotting at the end of the line-haul at the stock pile or receiving bin."



APPENDIX C

ORDERS AND FINDINGS OF THE INTERSTATE COMMERCE COMMISSION, AND OF RESPECTIVE STATUTORY COURTS, INVOLVED IN PRIOR DECISIONS OF THIS COURT, DISCUSSED UNDER POINT V OF THIS BRIEF.

Note: Under each prior decision of this Court, which will here be shown in large capitals, there will be shown, in italics, the titles and citations of each related report of the Interstate Commerce Commission, and of the related decision of each Statutory Court. Under each such report or decision will be shown the relevant findings and order of the Commission or Statutory Court. Italics shown in such quotations are supplied.

UNITED STATES V. AMERICAN SHEET AND TIN PLATE CO., 301 U. S. 402.

American Sheet and Tin Plate Co. Terminal Allowance, 209 I. C. C. 719.

Report p. 720 shows that industry, prior to allowance, performed terminal spotting service at own expense.

Report p. 721, shows following findings:

> "We find that interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments or carload freight; that the industry performs no service beyond such interchange for which the carrier is compensated under its interstate line-haul rates; * * *"

Pittsburgh Plate Glass Co. Terminal Allowance, 209 I. C. C. 467.

Report shows pp. 468, 469, that industry, prior to allowance, performed terminal spotting service beyond inter-

change tracks at own expense; also shows prior finding by the Interstate Commerce Commission, 58 I. C. C. 81, that the failure of the carriers to make the industry an allowance *was not unreasonable*, but that such failure of carriers to make allowance or perform terminal spotting service themselves, was unduly prejudicial because of allowances to competitors.

Report states p. 470:

> "Service of this character is not covered by respondent's interstate line-haul rates.
>
> "We find that the respondent carrier has complied with its legal obligations under the interstate line-haul rates by the delivery and receipt of carload freight on the interchange tracks described of record."

Weirton Steel Co. Terminal Allowance, 209 I. C. C. 445.

Report shows pp. 446, 447, that industry, prior to allowance, performed terminal switching services to scales and back to interchange tracks at own expense; also terminal spotting services.

Report shows following finding, p. 448:

> "We find that the switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates.

West Leechburg Steel Co. Terminal Allowance, 210 I. C. C. 213.

Report shows, p. 214, industry, prior to allowance, performed terminal spotting services at own expense.

Following finding appears p. 214:

> "We find that the existing line haul rates of the Pennsylvania must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the interchange tracks * * * constitute such a point."

Syllabus p. 213 reads:

> "Carriers' compensation under its line-haul rates found not to include service for which allowance is paid."

Allegheny Steel Co. Terminal Allowance, 209 I. C. C. 273.

Report shows p. 274, industry, prior to allowance, performed terminal spotting services at own expense; that in *Allegheny Steel Co.* v. *Director General*, 60 I. C. C. 575, 578, the Commission had found that the failure of the carriers to perform such spotting services or make an allowance to industry, *was not unreasonable*, but was discriminatory because of allowances to competitors.

Report shows following finding, p. 276:

> "We find that the existing line-haul rates of the Pennsylvania Railroad must be construed as framed to cover the delivery and receipt of shipments at a reasonably convenient point; that the interchange tracks described of record constitute such a reasonable point; * * * and that the switching movements by the Steel Company between such interchange tracks and points within its plant are plant services which it is not the duty of the respondents to perform under its line-haul rates."

Syllabus, p. 273, reads:

"Carriers compensation under their line haul rates found not to include service for which allowance is paid."

Pittsburgh Plate Glass Co. Terminal Allowance, 210 I. C. C. 527.

Report shows p. 528 industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 530:

"We find that the existing line haul rates of the Frisco and the Missouri Pacific must be construed as framed to cover the delivery and receipt of carload freight at reasonably convenient points; that the interchange tracks * * * constitute such reasonable points * * *."

Sylibus, p. 527, reads:

"Carriers compensation under their line-haul rates found not to include service for which allowance is paid."

GOODMAN LUMBER CO. v. UNITED STATES, 301 U. S. 669.

Goodman Lumber Co. Terminal Allowance, 214 I. C. C. 89.

Report shows, p. 90, industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 92.

"We find that the existing line-haul rates of respondent must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the * * * interchange tracks * * * constitute such reasonable points."

Syllabus p. 89 reads:

> "Service beyond the interchange tracks found to be a service for which a carrier is not compensated in its interstate line haul rates."

Goodman Lumber Co. v. *United States*, District Court, Eastern District of Wisconsin, Equity No. 4853 (unreported).

Statutory Court affirmed Commission's order without opinion, December 5, 1936. Appellees have obtained copies of Findings of Fact from the Clerk. Court's Finding of Fact 11 reads as follows:

> "The Commission found that the transportation included in the published rates begins and ends at said interchange tracks at Goodman, and that the 'spotting' service between those tracks and points within the plants is a plant service and not transportation covered by the line-haul rates * * *."

Finding of Fact 12 reads:

> "The court finds that the evidence received by the Commission supports the finding made by the Commission."

A. O. SMITH CORPORATION v. UNITED STATES, 301 U. S. 669.

A. O. Smith Corporation Terminal Allowance, 215 I. C. C. 534.

Report shows, p. 535, industry, prior to allowance, performed terminal spotting service at own expense.

Report there states:

> "The carrier has never performed the services upon the industrial track and in fact has never been requested to do so."

Further finds, p. 536:

> "The payment of an allowance to the Smith Corporation for performing the terminal spotting services depletes unnecessarily the revenues of the carriers and thus tends to shift the burden of paying for such delivery from the shoulders of the respondents, where it belongs, to the shoulders of the shipping public, who pays the bills."

Report also makes following finding, p. 536:

> "We find * * * that the service beyond such interchange tracks, is a plant service which respondent is not obligated to perform on the basis of the line-haul rates."

A. O. Smith Corporation v. *United States*, District Court, Eastern District of Wisconsin, Equity No. 4988.

Statutory Court affirmed the Commission's Order without opinion. Appellees have obtained copies of Findings of Fact from the Clerk. Only Finding relevant here is Finding 4:

> "The evidence before the Commission was sufficient to support the findings of the Commission and its order."

UNITED STATES v. PAN AMERICAN PETROLEUM CORPORATION, 304 U. S. 156.

Mexican Petroleum Corporation Terminal Allowance, 209 I. C. C. 394.

Report shows, p. 396, that industry, prior to allowance, performed terminal spotting service at own expense.

Report shows following finding, p. 396:

> "We find * * * that the Mexican Corporation performs no service beyond such points of inter-

change for which the respondent carrier is compensated in its interstate line haul rates; * * *".

Celotex Co. Terminal Allowance, 209 I. C. C. 764.

Report shows, p. 765, that industry, prior to allowance, performed terminal spotting service at own expense. Originally, carrier had performed part of terminal spotting service.

Report shows following finding, p. 766:

"We find * * * that the transportation service for which the carriers are compensated in their line haul rates begins and ends at said interchange tracks; * * *".

Great Southern Lumber Co.—Bogalusa Paper Co. Terminal Allowance, 209 I. C. C. 793.

Report shows, p. 794, that industry, prior to allowance, performed terminal spotting service at own expense. Also, no tariffs covering allowance.

Report shows finding p. 796:

"We further find that the transportation service, which it is the duty of the respondent carrier to perform under its line-haul rates, begins and ends at the interchange tracks * * *; that the service for which payment herein considered is made, is a plant service which respondent is not obligated to perform under its line haul rates."

Standard Oil Co. of Louisiana Terminal Allowance, 209 I. C. C. 68.

Report shows, p. 70, industry, prior to allowance, performed terminal spotting service at own expense.

Shows following finding, p. 72:

"In accordance with principles announced in the original report in this proceeding, we find the

carriers have complied with their obligations under the interstate line haul rate by the delivery and receipt of carload freight on the interchange tracks * * *."

Humble Oil and Refining Co. Terminal Allowance, 209 I. C. C. 727.

Report shows, pp. 728, 729, industry, prior to allowance, performed terminal spotting service at own expense.

Shows p. 730:

"We find * * * that the Humble Company performs no service beyond such points of interchange for which the T. & N. O. and the Missouri Pacific are compensated in their interstate line haul rates * * *".

Magnolia Petroleum Co. Terminal Allowance, 209 I. C. C. 93.

Report shows p. 95-97, industry, prior to allowance, performed terminal spotting service at own expense.

Also finding p. 98:

"We find * * * that the industry performs no service beyond such points of interchange for which the respondent carriers are compensated in their interstate line haul rates."

Texas Co. Terminal Allowance, 209 I. C. C. 767.

Report shows, p. 768, industry, prior to allowance, performed terminal spotting service at own expense.

Shows following finding, p. 769:

"The tariffs of the respondent carriers properly construed contemplate only the delivery or receipt of cars at a reasonable point. We find that the trans-

portation service, which it is the duty of the carriers to perform for the Texas Company under the interstate line haul rates or switching charges, begins and ends at the interchange tracks.

Gulf Refining Company Terminal Allowance, 209 I. C. C. 756.

Report shows, p. 758 that, prior to allowance, terminal spotting service covered by allowance, was performed partly by industry at own expense and partly by railroad.

Report also shows, pp. 759-760:

"The record is convincing that due to the competitive situation as between the respondent carriers little, if any, consideration was given by either to its common carrier obligation under the line haul rates when granting the allowance."

* * *

"By the allowance to the Gulf Co. both respondent carriers provided a substantially greater service at the same rate than they furnished prior to granting the allowance, and the effect is a reduction in the line haul rates, as to which there was no question of reasonableness at the time the allowance was granted."

The report shows the following finding, p. 760:

"We find * * * that the service for which the respondent carriers are compensated in their line haul rates begins and ends at said interchange tracks."

Texas Company Terminal Allowance, 213 I. C. C. 583.

Report shows, pp. 584-588, that apparently some of the spotting services were performed by industry at own expense prior to allowances.

Report makes following finding, p. 589:

> "Following the principles announced in *Propriety of Operating Practices—Terminal Services, supra*, and upon this record we find that the transportation service which it is the duty of the respondent carriers to perform for the Texas Company under interstate line-haul or switching charges, begins and ends at the interchange tracks described of record, which are reasonably convenient points for the receipt and delivery of carload freight, and that the service performed by the Texas Company within its plants beyond said interchange tracks is a plant service which it is not the duty of said respondents to perform."

Syllabus reads, p. 583:

> "Carriers' compensation under their interstate line-haul rates found not to extend beyond the present points of interchange, * * *".

UNITED STATES v. WABASH RAILROAD CO. (STALEY CASE), 321 U. S. 403.

A. E. Staley Manufacturing Company Terminal Allowance, 215 I. C. C. 656.

The report shows, p. 657, that prior to 1922, the Wabash and the Baltimore & Ohio apparently performed terminal spotting service at their own expense, but on account of interference, industry wished to perform such service itself, and allowance was granted May, 1922.

Shows p. 657 that in 1930, industry constructed Burwell Yard for interchange with all other carriers except Baltimore & Ohio, which continued interchange on prior interchange tracks.

Also states, p. 658, in connection with allowances granted by Pennsylvania, Illinois Central and Illinois Terminal Company:

"These carriers having apparently for competitive reasons granted same allowance as that paid between Baltimore and Ohio and Wabash * * *"

Then states, pp. 659, 660:

"The record is conclusive that the service performed by the two respondents which served the plant was continued because it was unsatisfactory to the Staley Company and interferred with industrial operations and that thereupon the allowance was granted * * *."

It is likewise shown by the record that the interchange tracks of the Staley Company were constructed primarily for its convenience and those tracks constitute a reasonably convenient point for the interchange of cars.

The report then finds, p. 660:

"We find * * * that the transportation service for which the respondents are compensated in their line haul rates, begins and ends at said points (i.e. interchange tracks).'3

A. E. Staley Manufacturing Co. Terminal Allowance, 245 I. C. C. 383.

Upon further hearing, the full Commission, in referring to former report says:

"The Division found * * * that transportation service for which respondents were compensated in their line haul rates, began and ended at those the (interchange) tracks."

The report then finds, p. 408:

"2. That all services between the Burwell or the storage or general yard of the Wabash and points of loading or unloading within the plant area within

> the Staley Company are plant services for the Staley Company and not common carrier services covered by the line haul rates and charges of respondent carrier."

Wabash R. Co. v. *United States*, 51 F. Supp. 141.

The decision of the Statutory Court in setting aside the orders of the Commission, is so thoroughly covered in the opinion of this Court, *supra*, that no further comment is here necessary.

CORN PRODUCTS REFINING COMPANY v. UNITED STATES, 331 U. S. 790

Corn Products Refining Co. Terminal Services, 266 I. C. C. 57.

The Commission's report shows that the carriers apparently had always performed the terminal spotting services in question. All terminal spotting, however, beyond certain "interchange" tracks was performed for the other carriers by the Chicago Belt.

The Report shows, p. 76:

> "We find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard described above constitutes such a reasonable point for the delivery and receipt of cars by the Chicago Belt and Alton; that the Indiana Harbor's yard adjacent to the plant or the main tracks within the plant taking off from its lead track from that yard, whichever the parties may agree on, constitutes such reasonable point for the delivery and receipt of cars by the Indiana Harbor; and that the transportation services which it is the duty of respondents to perform for the Corn Products Re-

fining Company under the line-haul rates begin and end at those tracks."

It is to be noted that the report does not show that the carriers' tariffs expressly provided for the performance of the terminal spotting services under the line-haul rates.

Corn Products Refining Co. Terminal Services, 266 I. C. C. 181.

The Commission, in this report on further hearing, stated, p. 199:

"We affirm the findings in the prior report."

Corn Products Refining Co, v. *United States*, 69 F. Supp. 869.

Prior to the reported decision of the Statutory Court, that Court had, on December 5, 1946, entered certain Findings of Fact, No. 9 of which reads as follows:

"9. There is sufficient substantial evidence to support the Commission's finding that the carriers' transportation service was complete upon delivery of cars to the interchange tracks and that spotting within plaintiff's plant is not included in the service for which the line-haul rates were fixed."

Further consideration of this case, in other respects, will be reserved for argument.